


San Francisco Law Library

No. 128542

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

No. 11008

v. 2427

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious
name of Whitehead & Co.,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUN 25 1945

PAUL P. O'BRIEN,
CLERK

No. 11008

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious
name of Whitehead & Co.,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.]

	Page
Answer and Counter-Claim.....	12
Answer to Counter-Claim.....	16
Appeal:	
Bond on	27
Notice of	26
Statement of Points on.....	32
Stipulation and Order re Record on.....	29
Bill of Particulars, Plaintiff's.....	7
Exhibit A. Notice in Writing Alleging Infringe- ment of Patent in Suit, Dated October 7, 1941.....	8
Exhibit B. Notice in Writing Alleging Infringe- ment of Patent in Suit, Dated October 17, 1941....	9
Exhibit C. Identification Card Made and Sold by Plaintiff	10
Exhibit D. Identification Card Made and Sold by Plaintiff	10
Bond on Appeal.....	27
Certificate of Clerk.....	35
Complaint	2
Findings of Fact and Conclusions of Law.....	22
Judgment	25
Names and Addresses of Attorneys.....	1

	Page
Notice of Appeal.....	26
Opinion, Memorandum	20
Statement of Points on Appeal.....	32
Statement of Points on Appeal (Circuit Court).....	158
Stipulation and Order Designating Portions of Record to Be Printed.....	159
Stipulation and Order re Record on Appeal.....	29
Stipulation Dated June 9, 1944.....	19
Summary Judgment as to Defendant John McK. Ballou	11
Reporter's Transcript	36
Defendant's Exhibits (See Index to Exhibits)	
Plaintiff's Exhibits (See Index to Exhibits)	
Testimony on Behalf of Defendant:	
Horowitz, David—	
Direct examination	92
Cross-examination	104
Redirect examination	110
Kruger, Otto H.—	
Direct examination	54
Cross-examination	88
Redirect examination	91
Direct examination (rebuttal).....	128
Testimony on Behalf of Plaintiff:	
Whitehead, Ned—	
Direct examination	116
Cross-examination	121
Redirect examination	125
Recross-examination	126
Redirect examination	127

INDEX TO EXHIBITS.

	Page
Defendant's Exhibits:	
A—Certified copy of Patent No. 2,088,567 (in evidence)	42
B—Certified copy of decision of Board of Appeals (in evidence)	51
C—Identification card of defendant (in evidence)....	61
D—Defendant's, Counter-claimants interrogatories (in evidence)	68
A—Photostatic prints of advertisement.....	71
B—Photostatic prints of advertisement.....	72
E—Answers to Defendant's, Counter-claimant's interrogatories (in evidence).....	73
A—Photostatic copy of cellulose acetate card....	75
F—Identification badge of Kaiser Company (in evidence)	77
Plaintiff's Exhibits:	
1 Certified copy of assignment of patent in suit of John McK. Ballou to Otto H. Kruger (for identification)	50
2. Title page and pages 733, 734, 774, 775, 776, 777 and 959 of Handbook of Plastics, by Herbert R. Simonds (for identification).....	112
3. Patent to Goodsell and Maynard 1,071,226 (in evidence)	113
(In Transcript)	137
4. Patent to Wilson, No. 953,081 (in evidence).....	113
(In Transcript)	141

Plaintiff's Exhibits:	Page
5. Patent to Longmessenger, No. 1,390,959 (in evidence)	114
(In Transcript)	145
6. Patent to Kimber, No. 895,664 (in evidence)	114
(In Transcript)	149
7. Patent to Walsh and Caprio, No. 2,079,641 (in evidence)	114
(In Transcript)	153
8. Certified copy of application of Walsh and Caprio as originally filed in the Patent Office (in evidence)	115
9A. Card bearing statement "Green RT-806" (in evidence)	118
9B, C, D, E, F, G and H. Cards similar to Exhibit 9A (in evidence)	119

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

HERBERT A. HUEBNER

433 South Spring Street

Los Angeles 13, California

For Appellee:

LYON & LYON

FREDERICK S. LYON

FREDERICK W. LYON

811 West Seventh Street

Los Angeles 14, California [1*]

In the United States District Court
Southern District of California
Central Division

Civil Action No. 3116-BH

NED WHITEHEAD, doing business under the fictitious
name of Whitehead & Co.,

Plaintiff, -

vs.

OTTO H. KRUGER and JOHN McK. BALLOU,
Defendants.

COMPLAINT

Comes Now the plaintiff and for cause of action against
defendants above named, Alleges:

I.

That plaintiff is a citizen of the State of California and
a resident of the City of Los Angeles in said State.

II.

That defendants are, and each of them is, citizens of
the State of California and residents of the City of Los
Angeles in said State. [2]

III.

That this is a suit for declaratory relief and the juris-
diction of this Court depends upon the Declaratory Relief
Act, Judicial Code Section 274d, 28 U. S. C. A. 400, and
the patent laws of the United States.

IV.

That this is a suit for declaratory relief arising because
of the defendants' assertion of ownership of and infringe-
ment by plaintiff of pretended United States Letters

Patent No. 2,088,567 granted to defendant, Otto H. Kruger August 3, 1937 for an "Identification Card";

That plaintiff is informed and upon such information and belief alleges that defendant, John McK. Ballou claims and asserts a right, title and interest in and to said pretended Letters Patent.

V.

That plaintiff has been and is now engaged in the manufacture and sale of Identification Cards and of material and equipment to be used in the manufacture of Identification Cards embodying and containing substances which, when put together in an Identification Card, are claimed and asserted by defendants to be an infringement of Claim 1 of said Letters Patent;

That defendant Otto H. Kruger has represented to plaintiff that said Letters Patent were granted and issued to him for the alleged invention of defendant John McK. Ballou, and has asserted that plaintiff's manufacture and his sale of component parts intended to be and which were completed by plaintiff's customers and by them completed as Identification Cards, constitutes infringement of said pretended Letters Patent;

That an actual controversy exists between plaintiff and said defendants as to the validity and alleged infringement of [3] said Letters Patent and of Claim 1 thereof, and in particular defendants have caused notice to be given in writing to Lockheed Aircraft Corporation of Burbank, California, that that company is knowingly infringing said Letters Patent No. 2,088,567 by completing identification cards from and with materials supplied to it by plaintiff.

VI.

That said pretended Letters Patent No. 2,088,567 are invalid and void, particularly as to Claim 1 thereof, because of the failure of the pretended inventor thereof, defendant John McK. Ballou, to comply with the requirements of Section 4888 of the Revised Statutes of the United States in that the written description contained in said Letters Patent of the same and of the manner and process of making, constructing, compounding and using it, is not in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound and use the same as required by such Statute;

That Claim 1 of said Letters Patent is invalid in law because it does not comply with said Section of said Statute in that it does not particularly point out and distinctly claim the part, improvement or combination claimed to be the invention or discovery.

VII.

That said John McK. Ballou is not the original and first inventor of that which is alleged to be patented in and by Claim 1 of said pretended Letters Patent No. 2,088,567, or any material or substantial part thereof, but on the contrary the same was and were matters of common knowledge in said art and did not require [4] the exercise of the inventive faculty to produce the same, and particularly that which is described and defined in Claim 1 of said pretended Letters Patent and all material

and substantial parts thereof, has been patented or described in each of the following Letters Patent:

United States Letters Patent

<u>Patentee.</u>	<u>Number</u>	<u>Date</u>
Andrew Reid and John Jameson	356,695	January 25, 1887
Adolph Bensinger	383,272	May 22, 1888
Emmor Kimber	894,664	July 28, 1908
James R. Wilson	953,081	March 29, 1910
Percy H. Goodsell and William E. Maynard	1,071,226	August 26, 1913
Francis M. Case	1,116,383	November 10, 1914
R. H. Casswell	1,893,225	January 3, 1933
John W. Hasburg	1,249,390	December 11, 1917
Paul C. Longmesser	1,390,959	September 13, 1921
A. D. Collins	1,490,801	April 15, 1924
Philip A. Sawyer	1,575,940	March 9, 1926
Thomas S. Reese	1,627,407	May 3, 1927
C. Scott	2,050,021	August 4, 1936
J. F. Walsh, et al.	2,079,641	May 11, 1937

British Letters Patent

328,070

252,186

781 of 1860

1513 of 1892 [5]

VIII.

That in view of the state of the art at and before the alleged invention of John McK. Ballou of the pretended invention attempted to be defined by Claim 1 of said pretended Letters Patent, the making and using of an identification card as defined in said Claim 1 was a matter of common knowledge and within the knowledge and skill of the ordinary workman in said art; that no invention was required to produce the same, but was and is a mere adaptation of well known methods, devices and compositions of matter for the required uses involving merely the skill expected of one in the art to which said pretended Letters Patent pertain.

Wherefore, plaintiff prays for judgment against defendants, and each of them, decreeing that said Letters Patent, particularly as to Claim 1, be deemed invalid and void and that plaintiff has not infringed thereof; That plaintiff be awarded his costs herein, and That plaintiff have such other, further or different relief as in equity and good conscience the Court may deem, under the circumstances, required.

Dated this 27th day of August, 1943.

Lyon & Lyon

Frederick S. Lyon

Frederick W. Lyon

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 27, 1943. [6]

[Title of District Court and Cause.]

PLAINTIFF'S BILL OF PARTICULARS

Comes Now the plaintiff and alleges, in answer to the defendant Otto H. Kruger's request for a Bill of Particulars, as follows:

I.

The attached Exhibits "A" and "B" are notices in writing alleging infringement of the patents in suit.

II.

By stipulation, no answer is required to this request. [21]

III.

As plaintiff does not know the scope, nor what the defendant will claim as the alleged invention of the patent in suit, plaintiff will rely upon all of the patents and patentees referred to in paragraph VII of the Complaint herein, and will rely upon all of the patents and patentees to show anticipation and state of the art.

IV.

By stipulation no answer is required to request number Four.

V.

Attached hereto and marked Exhibit "C" and Exhibit "D" are the types of identification cards which the plaintiff has made, sold and used.

Dated: Los Angeles, California, this 12th day of April, 1944.

Lyon & Lyon
Frederick S. Lyon
Frederick W. Lyon

Attorneys for Plaintiff [22]

EXHIBIT "A"

IRVIN C. LOUIS

LAWYER

715 Haas Building
219 West Seventh Street
Los Angeles
TRinity 5749

Oct. 7th, 1941

Lockheed Aircraft Corporation
1705 Victory Place,
Burbank, California.

Attention Mr. Robert Gross

Gentlemen:

We represent Mr. John McK Ballou, inventor of a patented unalterable identification card U. S. Patent No. 2088567.

Mr. Ballou is informed that your Company is knowingly infringing this patent and we would appreciate a conference with you in connection therewith.

Yours very truly,

IRVIN C. LOUIS & J. TORRANCE

ICL/t

By Irwin C. Louis [23]

EXHIBIT "B"

IRVIN C. LOUIS

LAWYER

715 Haas Building
219 West Seventh Street
Los Angeles
TRinity 5749

Oct. 17th, 1941

Lockheed Aircraft Corporation,
Attention Robert E. Gross, President,
Burbank, California

Gentlemen:

This will acknowledge receipt of your letter dated Oct. 13, 1941 relative to U. S. Patent No. 2,088,567 pertaining to an unalterable identification card.

Inasmuch as it takes some time to obtain a copy of the patent from Washington, for your convenience we enclose a copy thereof. We are doing this notwithstanding the fact that prior to the time you put your identification cards into use this patent was submitted to your Mr. Hanson, whom we understand is in charge of Plant Protection.

Subsequent to the time that the patent was infringed we are advised that your Mr. Sullivan had a copy of the patent in his possession for approximately one week.

In view of the foregoing it should not take very long for you to complete your investigation.

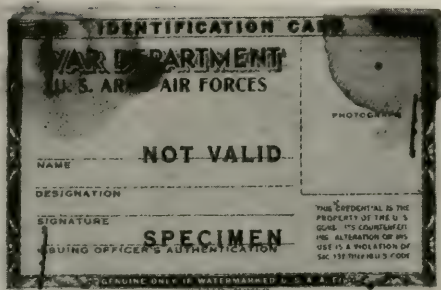
Yours very truly,

IRVIN C. LOUIS & J. TORRANCE

ICL/t

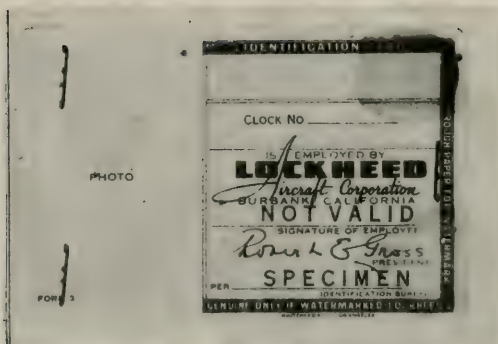
By Irvin C. Louis [24]

EXHIBIT "C"



[25]

EXHIBIT "D"



[Endorsed]: Filed Apr. 12, 1944. [26]

[Title of District Court and Cause.]

ORDER FOR SUMMARY JUDGMENT

This cause came on to be heard on the motion of John McK. Ballou for a summary judgment, pursuant to Rule 56 of Federal Rules of Civil Procedure, and the Court finding that the undisputed fact is that for considerable time prior to August 27, 1943, the date on which this cause was filed, defendant John McK. Ballou has not had **any right, title or interest in or to the Letters Patent in suit, No. 2,088,567;**

It Is Hereby Ordered, Adjudged and Decreed that this action be dismissed as to said defendant John McK. Ballou and that said [28] defendant recover his costs in the amount of \$7.00.

Dated at Los Angeles, California, this 17 day of Apr., 1944.

Ben Harrison

United States District Judge

Approved as to form:

Frederick S. Lyon

Attorneys for Plaintiff

R. Welton Whann

Robert M. McManigal

Attorneys for Defendant, Otto H. Kruger

Dismissal entered Apr. 17, 1944. Docketed Apr. 17, 1944. Book C. O. #24, Page 762. Edmund L. Smith, Clerk, by Murray E. Wire, Deputy.

[Endorsed]: Filed Apr. 17, 1944. [29]

In the United States District Court
Southern District of California
Central Division

Civil Action No. 3116-BH

NED WHITEHEAD, doing business under the fictitious
name of Whitehead & Co.,

Plaintiff, Cross-Defendant

vs.

OTTO H. KRUGER,

Defendant, Cross-Complainant
and

JOHN McK. BALLOU,

Defendant.

ANSWER TO COMPLAINT

Comes now defendant Otto H. Kruger and answering plaintiff's complaint, admits, denies, and alleges as follows:

I.

Answering the allegations of paragraph IV of the complaint, answering defendant admits that this is a suit for declaratory relief arising because of answering defendant's assertion of ownership of and [30] infringement by plaintiff of United States Letters Patent No. 2,088,567 granted to defendant, Otto H. Kruger, August 3, 1937 for an "Identification Card".

Other than as expressly admitted hereinabove, answering defendant denies each and every, all and singular, of the allegations of said paragraph.

II.

Answering the allegations of paragraph V of the Complaint, answering defendant admits that the plaintiff has been and is now engaged in the manufacture and sale of Identification Cards and of material and equipment to be used in the manufacture of Identification Cards embodying and containing substances which, when put together in an Identification Card, are claimed and asserted by answering defendant to be an infringement of Claim 1 of said Letters Patent; that answering defendant has represented to plaintiff that said Letters Patent were granted and issued to him for the invention of defendant John McK. Ballou, and has asserted that plaintiff's manufacture and his sale of component parts intended to be and which were completed by plaintiff's customers and by them completed as Identification Cards, constitutes infringement of said Letters Patent; that an actual controversy exists between plaintiff and said answering defendant as to the validity and infringement of said Letters Patent and of Claim 1 thereof; and that defendant John McK. Ballou has caused notice to be given in writing to Lockheed Aircraft Corporation of Burbank, California that that company is knowingly infringing said Letters Patent No. 2,088,567 by completing identification cards from and with materials supplied to it by plaintiff.

Other than as expressly admitted hereinabove, answering defendant denies each and every, all and singular, of the allegations of said paragraph. [31]

III.

Answering the allegations of paragraph VI of the Complaint, answering defendant denies each and every, all and singular, of the allegations of said paragraph.

IV.

Answering the allegations of paragraph VII of the Complaint, answering defendant denies each and every, all and singular, of the allegations of said paragraph.

V.

Answering the allegations of paragraph VIII of the Complaint, answering defendant denies each and every, all and singular, of the allegations of said paragraph.

COUNTER CLAIM

The cross-complainant above named, for cause of action against the cross-defendant above named, alleges as follows:

A.

That this Court has jurisdiction herein by reason of the fact that this is a suit arising under the patent laws of the United States of America.

B.

On August 3, 1937, United States Letters Patent No. 2,088,567 were duly and legally issued to cross-complainant for an invention in an identification card; and since said date cross-complainant has been and still is the owner of said Letters Patent. [32]

C.

Cross-defendant has for a long time past been and still is infringing those Letters Patent by making, selling, and using identification cards embodying the patented invention, and will continue to do so unless enjoined by this Court.

D.

Cross-complainant has placed the required statutory notice on all identification cards manufactured and sold by him under said Letters Patent, and has given written notice to cross-defendant of his said infringement.

Wherefore, answering defendant, cross-complainant, demands that the plaintiff's complaint herein be dismissed, a final injunction against further infringement by plaintiff, cross-defendant, and those controlled by plaintiff, cross-defendant, an accounting of profits and damages, an assessment of costs against plaintiff, cross-defendant, and for such other and further relief as may be just in the premises.

Signed at Los Angeles, California, this 21st day of April, 1944.

R. WELTON WHANN

ROBERT M. McMANIGAL

Attorneys for Defendant, Cross-Complainant

[Endorsed]: Filed Apr. 21, 1944. [33]

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Comes Now the plaintiff, Ned Whitehead, and answering defendants' counterclaim, admits, denies, and alleges as follows:

I.

Answering the allegations of Paragraph A of the counterclaim, plaintiff admits that this is a suit arising under the patent laws of the United States of America. [34]

II.

Answering Paragraphs B, C, and D, plaintiff, cross-defendant, denies each and every allegation thereof other than that said Letters Patent were issued.

Further Answering the cross-complaint herein, for separate, alternate, and further defenses, plaintiff, cross-defendant alleges:

I.

That said pretended Letters Patent No. 2,088,567 are invalid and void, particularly as to Claim 1 thereof, because of the failure of the pretended inventor thereof, defendant John McK. Ballou, to comply with the requirements of Section 4888 of the Revised Statutes of the United States in that the written description contained in said Letters Patent of the same and of the manner and process of making, constructing, compounding and using it, is not in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound and use the same as required by such Statute.

II.

That said John McK. Ballou is not the original and first inventor of that which is alleged to be patented in and by Claim 1 of said pretended Letters Patent No. 2,088,567, or any material or substantial part thereof, but on the contrary the same was and were matters of common knowledge in said art and did not require the exercise of the inventive faculty to produce the same, and particularly that which is described and defined in Claim 1 of said pretended Letters Patent and all material and substantial parts thereof, has been patented or described in each [35] of the following Letters Patent:

<u>United States Letters Patent</u>		
<u>Patentee</u>	<u>Number</u>	<u>Date</u>
Andrew Reid and John Jameson	356,695	January 25, 1887
Adolph Bensinger	383,272	May 22, 1888
Emmor Kimber	894,664	July 28, 1908
James R. Wilson	953,081	March 29, 1910
Percy H. Goodsell and William E. Maynard	1,071,226	August 26, 1913
Francis M. Case	1,116,383	November 10, 1914
R. H. Casswell	1,893,225	January 3, 1933
John W. Hasburg	1,249,390	December 11, 1917
Paul C. Longmessenger	1,390,959	September 13, 1921
A. D. Collins	1,490,801	April 15, 1924
Philip A. Sawyer	1,575,940	March 9, 1926
Thomas S. Reese	1,627,407	May 3, 1927
C. Scott	2,050,021	August 4, 1936
J. F. Walsh, et al.	2,079,641	May 11, 1937

British Letters Patent

328,070

252,186

781 of 1860

1513 of 1892 [36]

III.

That in view of the state of the art at and before the alleged invention of John McK. Ballou of the pretended invention attempted to be defined by Claim 1 of said pretended Letters Patent, the making and using of an identification card as defined in said Claim 1 was a matter of common knowledge and within the knowledge and skill of the ordinary workman in said art; that no invention was required to produce the same, but was and is a mere adaptation of well known methods, devices and composition of matter for the required uses involving merely the skill expected of one in the art to which said pretended Letters Patent pertain.

Wherefore, plaintiff, cross-defendant prays for judgment against defendants, and each of them, decreeing that said Letters Patent be deemed invalid and void and that plaintiff has not infringed thereof; That plaintiff be awarded his costs herein, and That plaintiff have such other, further or different relief as in equity and good conscience the Court may deem, under the circumstances, required.

Dated this 24th day of April, 1944.

Lyon & Lyon

Frederick S. Lyon

Frederick W. Lyon

Attorneys for Plaintiff

[Endorsed]: Filed Apr. 28, 1944. [37]

[Title of District Court and Cause.)

STIPULATION.

It Is Hereby Stipulated, by and between counsel for the respective parties herein:

That at the trial of this action uncertified printed, photostatic or photographic copies of United States patents heretofore pleaded may be offered in evidence by either party with the same force and effect as the originals or duly certified copies thereof, subject to the usual objections as to materiality or relevancy;

That uncertified printed, photostatic or photographic copies of foreign patents heretofore pleaded and bearing the stamp of the United States Patent Office showing the date of the [38] receipt thereof may be offered in evidence by either party with the same force and effect as the originals or duly certified copies thereof, subject to the usual objections as to materiality or relevancy;

That the date of publication of all publications heretofore pleaded appearing thereon shall be considered the date of publication thereof;

That all patents, domestic and foreign, and all printed publications offered in evidence and covered by this Stipulation shall be subject to correction for error and that the filing dates of the applications for patents which appear upon said copies shall be considered the dates the disclosures shown and described therein were filed in the United States Patent Office and the respective foreign Patent Offices.

Dated: This 9th day of June, 1944.

LYON & LYON

By Frederick S. Lyon

Frederick W. Lyon

Attorneys for Plaintiff

Otto H. Kruger

in person

[Endorsed]: Filed Sep. 7, 1944. [39]

[Title of District Court and Cause.]

MEMORANDUM OPINION.

The patent in suit refers to an identification card and generally speaking Claim 1 is illustrative of all five claims. Claim 1 reads as follows:

"1. In an identification card, a cover that may be dissolved by a certain solvent, a card proper disposed under the cover, and distinguishing matter made to dissolve by the same solvent and associated with the card and the cover so as to disclose tampering with the card to the extent of reaching the matter by means of such solvent through distortion of the matter by the action of the contacting solvent."

It will be noted that the gist of the patent is the discovery of a solvent that when it dissolves the transparent covering, usually celluloid, also destroys or mutilates the printed matter within. The patent does not give or furnish the means of constructing such an identification card, or the compounds used therein.

The plaintiff contends that the patent is invalid under the provision of R. S. U. S. 4888, under its complaint for declaratory judgment, while the owner of said patent con-

tends that one skilled in the art could follow the teachings of the patent without difficulty.

Defendant and patent owner introduced evidence through its expert, Mr. Horowitz, to the effect that any ink would be substantially affected by the use of a solvent such as acetate that would [40] dissolve the covering. On the other hand, plaintiff contended that only certain inks would be so affected.

If the evidence offered by the patent holder is to be accepted, we have no discovery and therefore no patent, while on the other hand, if plaintiff's testimony is to be accepted by the court, we have a problem stated without the solution. Under either viewpoint the patent is clearly invalid.

In view of the presumption of validity, I am accepting the testimony of the patent holder's expert. The defendant patent holder by attempting to prove his patent complies with R. S. U. S. 4888 has convinced the court that his patent is not the result of inventive genius but at the most required only the work of one skilled in the art. As a matter of fact I feel no discovery was made. The problem, according to the defendant, was the finding of certain inks that would be dissolved or caused to bleed by the same solvent that would dissolve the transparent covering. The solvents for the coverings were well known, and if, as a matter of fact all inks would be substantially affected by such solvents, the problem of discovering the proper ink did not exist.

Plaintiff is entitled to judgment as prayed for and counsel for plaintiff is directed to submit proposed findings and judgment within ten days.

Dated: Los Angeles, California, October 16 1944.

BEN HARRISON

Judge

[Endorsed]: Filed Oct. 16, 1944. [41]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

I.

That plaintiff is a citizen of the State of California and a resident of the City of Los Angeles in said state.

II.

That defendant is a citizen of the State of California and a resident of the City of San Marino, in the County of Los Angeles, State of California.

III.

That this suit was instituted by the plaintiff, Ned Whitehead, as an action for Declaratory Relief under the Delaratory Relief Act, Judicial Code §274d, 28 U. S. C. A. 400, alleging the ownership by the defendant, Otto H. Kruger, of United States [42] Letters Patent No. 2,088,-567, and that said defendant had charged plaintiff and his customers of infringement of said Letters Patent, and that this Court declare said Letters Patent invalid and void. Defendant in his answer admitted these allegations.

IV.

That the defendant is the owner with all right, title and interest in United States Letters Patent No. 2,088,567 granted to Otto H. Kruger August 3, 1937 for an "Identification Card".

V.

That plaintiff has been engaged in the manufacture and sale of identification cards.

VI.

That defendant has represented to plaintiff that he is the owner of said Letters Patent and that the manufac-

ture and sale of identification cards by plaintiff constituted an infringement of said Letters Patent.

VII.

That defendant has notified plaintiff's customers that plaintiff's manufacture and sale of said identification cards constituted an infringement of said Letters Patent and that any use of said identification cards by said customers would be an infringement of said Letters Patent.

VIII.

That United States Letters Patent No. 2,088,567 discloses an identification card comprising a sheet of paper with certain printed markings thereon enclosed in a transparent cover, such as cellulose acetate, on which the printing on the card is done in inks that will bleed and disappear when a solvent for the cover is applied thereto. [43]

IX.

That the patent in suit does not give or furnish the means of constructing such an identification card or the compounds used therein.

X.

That all inks would be substantially affected by the use of a solvent for the acetate cover.

XI.

That the patent in suit is not the result of inventive genius but at the most required only the work of one skilled in the art, and no discovery was made by Ballou

XII.

The problem sought to be solved by the patent in suit was the finding of certain inks that would dissolve or cause to bleed by the same solvent that would dissolve the transparent covering. The solvents for the coverings were well known, and as a matter of fact all inks would be substantially affected by said solvents. The problem of discovering the proper ink did not exist.

Conclusions of Law

I.

That this Court has jurisdiction of the subject matter involved herein under the Declaratory Relief Act, Judicial Code §274d, 28 U. S. C. A. 400.

II.

That claims 1, 2, 4 and 5 are invalid as not disclosing inventive genius but at the most required only the work of one skilled in the art. [44]

III.

That defendant's counterclaim should be dismissed for want of equity.

IV.

That plaintiff is entitled to an injunction against the defendant, his agents or representatives, from further representing to the trade, particularly to plaintiff's customers, that the identification card manufactured by plaintiff is an infringement or that any use or trade by said customers is an infringement of said Ballou Patent No. 2,088,567.

Dated at Los Angeles, California, this 15th day of November, 1944.

BEN HARRISON

U. S. District Judge

The foregoing Findings of Fact and Conclusions of Law is approved as to form this 14th day of November, 1944.

LYON & LYON

Frederick S. Lyon

Frederick W. Lyon

Attorneys for Plaintiff, Counter Defendant [45]

[Endorsed]: Filed Nov. 15, 1944. [47]

In the United States District Court
Southern District of California
Central Division

Civil Action No. 3116-B H

NED WHITEHEAD, doing business under the fictitious
name of Whitehead and Company,

Plaintiff, Counter Defendant

vs.

OTTO H. KRUGER,

Defendant, Counter Claimant

FINAL JUDGMENT

This cause came on to be heard at final hearing on the pleadings and proof of all parties, and was briefed and argued by counsel. Thereupon, upon consideration thereof, it is Ordered, Adjudged and Decreed:

(1) That claims 1, 2, 4 and 5 of Ballou Patent No. 2,088,567 are invalid in law.

(2) That a permanent injunction issue against the defendant, his agents and representatives, from further representing to the trade, and particularly to plaintiff's customers, that identification cards manufactured by plaintiff are an infringement of or that any use of said trade or customers is an infringement of said Ballou Patent No. 2,088,567.

(3) That the counterclaim herein be and the same is hereby dismissed. [48]

(4) That the plaintiff have judgment against the defendant, Otto H. Kruger, for his necessary costs and disbursements incurred herein, including the Court Reporter's fees, and the cost of the Court's copy of the

transcript of record, all in the sum of \$86.55 to be taxed
Retaxed 61.55

by the Clerk.

Dated at Los Angeles, California, this 15 day of Nov.,
1944.

BEN HARRISON

U. S. District Judge

The foregoing formal Judgment is approved as to form
this 25th day of October, 1944.

LYON & LYON

Frederick S. Lyon

Frederick W. Lyon

Attorneys for Plaintiff, Counter Defendant

Judgment entered Nov. 15, 1944. Docketed Nov. 15,
1944. Book C. O. #29, page 68. Edmund L. Smith,
Clerk, by Murray E. Wire, Deputy.

[Endorsed]: Filed Nov. 15, 1944. [49]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Otto H. Kruger, Defendant and Counter-claimant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on November 15, 1944.

Dated: February 8, 1945.

HERBERT A. HUEBNER

Herbert A. Huebner

Attorney for Defendant and Counter-Caimant

[Endorsed]: Filed & Mailed copy to Lyon & Lyon,
Frederick S. Lyon, Frederick W. Lyon, Attys. for plf.,
Feb. 9, 1945. [50]

[Title of District Court and Cause.]

NATIONAL
Automobile and Casualty
Insurance Co.
Los Angeles

UNDERTAKING FOR COST ON APPEAL

Whereas, Otto H. Kruger, Defendant, Counter-Claimant in the above entitled action is about to appeal to the Circuit Court of *Appeal* for the Ninth Circuit from a judgment entered in said action on the 15th day of November, 1944, in the District Court of the United States, for the Southern District of California, Central Division.

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Co., a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Co., has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los

Angeles, California, and its corporate seal to be hereto affixed, this 8th day of February, 1944.

NATIONAL AUTOMOBILE AND
CASUALTY INSURANCE CO.

(Seal)

By: FRED W. WEITZEL
Fred W. Weitzel,
Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this 8th day of February, in the year 1945, before me, Ruth E. Harris a Notary Public in and for said County and State, personally appeared Fred W. Weitzel, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the National Automobile and Casualty Insurance Co., and acknowledged to me that he subscribed the name of the National Automobile and Casualty Insurance Co., thereto as principal, and his own name as Attorney-in-Fact.

(Seal)

RUTH E. HARRIS

Notary Public in and for Said County and State

My Commission Expires Sept. 27, 1947.

The Premium charged for this Bond is \$10 per annum.

[Endorsed]: Filed Feb. 9, 1945. [51]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR RECORDS
AND EXHIBITS ON APPEAL

It Is Hereby Stipulated by and between the attorneys for the respective parties, pursuant to Rule 75 (f) Federal Rules of Civil Procedure, that the record, proceedings and evidence in the record on appeal in the above entitled matter shall include the following:

1. Complaint filed August 27, 1943.
2. Notice and motion under Rule 56 for summary judgment by defendant Ballou filed September 24, 1943.
3. Notice of hearing and motion to drop defendant Ballou or for severance of claim under Rule 21 and to strike matter from plaintiff's complaint; and motion for bill of particulars, all filed September 24, 1943.
4. Minute order of October 25, 1943. [52]
5. Plaintiff's bill of particulars filed April 12, 1944, including the exhibits therein.
6. Order for summary judgment filed April 17, 1944.
7. Answer to complaint and counter-claim filed April 21, 1944.
8. Answer to counter-claim filed April 28, 1944.
9. Stipulation concerning the admissibility of certain evidence filed September 7, 1944.
10. Defendant's interrogatories filed August 24, 1944, including exhibits attached thereto.
11. Answer to interrogatories filed August 7, 1944, including exhibits attached thereto.
12. Memorandum opinion dated October 16, 1944.

13. Findings of fact and conclusions of law signed and filed November 15, 1944.
14. Final judgment filed November 15, 1944.
15. Notice of appeal.
16. Cost Bond on appeal.
17. The entire Reporter's Transcript of Testimony and Proceedings on Trial.
18. This Stipulation and Order.

It Is Further Stipulated, subject to the approval of the Court, that no duplicate or copy of the Reporter's Transcript of Testimony and Proceedings on Trial need be filed but the Clerk of the District Court is authorized to transmit to the Appellate Court the original Reporter's Transcript of Testimony and Proceedings on Trial now filed with the Clerk of the above named District Court for the purpose of printing from the same. [53]

It Is Further Stipulated, subject to the approval of the Court, that the Clerk of said District Court be, and he is hereby, authorized to transmit to the Appellate Court the following physical and documentary exhibits without duplication, in their original form as now on file:

Plaintiff's Exhibits:

- (1) Certified photostatic copy of file wrapper and contents of United States Letters Patent No. 2,088,567.
- (2) Copy of Letters Patent No. 1,071, 226.
- (3) Copy of Letters Patent No. 953,081.
- (4) Copy of Letters Patent No. 1,390,959.
- (5) Copy of Letters Patent No. 894,664.
- (6) Copy of Letters Patent No. 2,079,641.

(7) Certified photostatic copy of petition, specification, oath, and drawings, etc., of Letters Patent No. 2,079,641.

(8) Exhibits 9-A to 9-H, inclusive.

Defendant's Exhibits:

(A) Certified copy of Letters Patent No. 2,088,567.

(B) Certified photostatic copy of decision of the Board of Appeals dated 7/1/36 respecting Letters Patent No. 2,088,567.

(C) Identification card of defendant.

(D) Defendant's interrogatories.

(E) Plaintiff's answers to defendant's interrogatories.

(F) Identification badge of Keyser Company, Inc. (manufactured by plaintiff). [54]

(G) Identification card of Basic Magnesium, Inc. (manufactured by plaintiff).

Dated the 1st day of March, 1945.

LYON & LYON

Frederick W. Lyon

Attorneys for Plaintiff

HERBERT A. HUEBNER

Herbert A. Huebner

Attorney for Defendant, Counter-Claimant.

Good cause appearing, the foregoing Stipulation is hereby approved and it is so ordered.

BEN HARRISON,

Judge.

[Endorsed]: Filed Mar. 12, 1945. [55]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
UNDER RULE 75 (d)

I.

The District Court erred in holding in its Memorandum Opinion dated October 16, 1944 (page 2, lines 13 to 16) that the problem was the finding of certain inks that would be dissolved or caused to bleed by the same solvent that would dissolve the transparent covering.

II.

The District Court erred in holding in its Memorandum Opinion dated October 16, 1944 (page 1, lines 21 to 23) that the gist of the patent is the discovery of a solvent that, when it dissolves the transparent covering, usually celluloid, also destroys or mutilates the printed matter within.

III.

The District Court erred in holding in its Memorandum [56] Opinion dated October 16, 1944 (page 1, lines 30 to 32 and page 2, line 1) that the witness Horowitz testified that any ink would be substantially affected by the use of a solvent, such as acetate, that would dissolve the covering.

IV.

The District Court erred in holding in its Memorandum Opinion dated October 16, 1944 (page 2, lines 3 to 7) that under either the patent holder's or the plaintiff's evidence the patent is clearly invalid.

V.

The District Court erred in its finding of fact number VIII that the United States Letters Patent No. 2,088,-567 discloses an identification card comprising a sheet of paper with certain printed markings thereon enclosed in a transparent cover, such as cellulose acetate, on which the printing on the card is done in ink that will bleed and disappear when a solvent for the cover is applied thereto.

VI.

The District Court erred in its findings of fact number IX that the patent in suit does not give or furnish the means of constructing such an identification card or the compound used therein.

VII.

The District Court erred in its finding of fact number X that all inks would be substantially affected by the use of a solvent for the acetate cover.

VIII.

The District Court erred in its finding of fact number XI that the patent in suit is not the result of inventive genius but at most required only the work of one skilled in the art, and no discovery was made by Ballou. [57]

IX.

The District Court erred in its finding of fact number XII that all inks would be substantially affected by the solvents for the coverings.

X.

The District Court erred in its conclusion of law number II that claims of patent No. 2,088,567 numbered 1, 2, 4, and 5 are invalid.

XI.

The District Court erred in not adjudging that the patent in suit is valid when infringed by the identification card manufactured by plaintiff's customers from materials furnished to them by the plaintiff.

XII.

The District Court erred in its conclusion of law number III that defendant's counter-claim should be dismissed for want of equity.

XIII.

The District Court erred in granting an injunction to the plaintiff.

XIV.

The District Court erred in that its judgment in favor of plaintiff was contrary to the weight of the evidence.

XV.

The District Court erred in failing to give judgment for the defendant because the plaintiff failed to sustain his burden of proof.

Dated March 8, 1945.

HERBERT A. HUEBNER

Herbert A. Huebner

Attorney for Defendant and Counter-Claimant.

[Endorsed]: Filed Mar. 17, 1945. [58]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 58 inclusive contain full, true and complete copies of Complaint; Notice and Motion Under Rule 56 for Summary Judgment by Defendant John McK. Ballou; Notice of Hearing; Motion to Drop Defendant Kruger or for (1) Severance of Claim Under Rule 21, and (2) To Strike Matter from the Plaintiff's Complaint; Motion of Defendant Kruger for Order Compelling Plaintiff to File a More Definite Statement or Bill of Particulars; Plaintiff's Bill of Particulars; Minute Order Entered October 25, 1943; Order for Summary Judgment; Answer to Complaint with Counter-Claim; Answer to Counterclaim; Stipulation; Memorandum Opinion; Findings of Fact and Conclusions of Law; Final Judgment; Notice of Appeal; Undertaking for Costs on Appeal; Stipulation and Order for Records and Exhibits on Appeal and Statement of Points on Appeal, which, together with Original Reporter's Transcript and Original Exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$8.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 17th day of March, 1945.

EDMUND L. SMITH,

(Seal)

Clerk

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
TESTIMONY AND PROCEEDINGS ON TRIAL.

Los Angeles, California, Thursday, September 7, 1944;
10 A. M.

The Clerk: Ned Whitehead, doing business under the fictitious name of Whitehead & Company, vs. Otto H. Kruger.

Mr. Frederick W. Lyon: Ready for plaintiff.

Mr. Franklin: Ready for defendant.

The Court: Proceed.

Mr. Frederick S. Lyon: This suit was originally brought under the declaratory judgment statute, your Honor, and the defendant counterclaimed on the patent, for infringement. If we proceed first, we anticipate that we are probably faced with the proposition of putting in more testimony than would otherwise be required, and I wonder if the court would want the patentee to proceed in the same manner as though the suit was on the counterclaim.

The Court: What is the position of the defendant in this case?

Mr. Franklin: Well, I don't think we have any particular objection to that, but the notices have been sent and the—

The Court: Are you willing to proceed with your evidence first?

Mr. Franklin: I am willing to do so. That is discretionary with the court.

The Court: I realize that that is discretionary with the court, but the court will not require you to do so unless you [2*] are willing to do so. The plaintiff is the moving party in this case, and the burden of proof is on him on his cause of action, and I will require him to proceed first, unless you feel that it would simplify matters to proceed the other way. I notice in the pre-trial statement that the defendant filed in his own behalf he tenders that procedure. Now that he is going to be represented by counsel I am not going to require it.

Mr. Franklin: I believe it would simplify the case.

The Court: That will be the order, then.

Mr. Franklin: The patent in suit, No. 2,088,567, relates to an identification card, which has become useful and has received the endorsement of the—

The Court: I am familiar with the general type of the patent. I have read the pre-trial statement and I have read the patent, so that I know the general nature of the patent.

Mr. Franklin: Well, I think it might be well to state some of the important features of the invention.

The Court: Proceed. Is it true that the important feature of this patent is the fact that the casing and the ink on the card are subject to being taken care of by the same procedure?

Mr. Franklin: That is correct. Of course, the card itself is an identification card, and that is an important feature of the invention. An ordinary picture or some other kind of card is put in there that does not come within the [3] scope of the claims or the spirit of the invention. The idea or inventive concept is the identification card, which cannot be tampered with, without being defaced or mutilated, so that it will become defective.

And, as I understand these identification cards, one might get hold of one of these cards and remove the photograph or change the reading matter on it, and get into a plant and dynamite it, and the idea is to have an identification card that will prevent that, to a large extent.

As far as the prior art is concerned, that novel concept has not been shown in the prior art, and this is the first device that will accomplish that particular result. For that reason the invention is novel and patentable and a very useful invention.

The ink that is on the card is an ink that will run or bleed when a solvent is applied to the cover. It dissolves in solvents, and the ink bleeds and runs and defaces the card, so that it can be readily detected. Of course, it does not have to completely deface or destroy the card, but it substantially defaces the card, so that it may be detected, and that answers the purpose of the invention. The detection of the alteration of one of these identification cards is the principal feature of the invention which we claim was new and useful.

I notice that the answer to the counterclaim sets up a rather novel defense, that the specifications and claims do [4] not describe the invention with sufficient particularity to enable others skilled in the art to produce the invention. One significant fact of the case is that the counter-defendant has had no trouble in producing it himself. That is set up in a case that went to the Circuit Court of Appeals, where an irrigation system—where an irrigation pipe which was connected to a valve, that that valve had always before that been connected by bolts, but this invention had the end of the pipe go in a flange on the valve gate, and there was space between the pipe and the flange, and they cemented it on, and the cement

held it on and kept the pressure from below off the gate. The validity of that patent was attacked on the ground that it didn't describe the use of cement, and the Circuit Court of Appeals in this Circuit, in *Snow v. Kellar-Thomason Co.*, 241 Fed. 119—

The Court: Mr. Franklin, let us not argue the case at this time. I would like to get the evidence in here, and the facts before the court, and then I will let you do the arguing.

Mr. Franklin: I just wanted to cite that case, and we are prepared to cite a number of cases on chemical patents later. Now, we have our expert to testify—

The Court: Is the patent introduced in evidence yet?

Mr. Franklin: Not yet, your Honor. From the description, it involves merely elementary chemistry, and any ink maker, with this description calling for a solvent and an ink [5] which would bleed when subjected to a solvent which would dissolve the color, that any ink maker could produce an ink that would answer that specification. There are solvents that are known to the art—and we can cite some of the patents to show that—that will do that very thing, that will dissolve both the plastic and the ink.

There is one feature of this case, that the parties were negotiating for the sale of the patent, and—

The Court: I have read the defendant's pre-trial statement in this matter, and I know generally what the patent is about and what the owner of this patent claims, and I want to hear the evidence.

Mr. Franklin: Very well. I just came into the case, your Honor, and—

The Court: But you have been in it some time. And I have had an opportunity of reading the defendant's statement that he filed with the court, giving the history of his negotiations with the defendant, and, all of a sudden, the breaking off of the negotiations and the commencement of this action.

Mr. Franklin: I didn't see that in the brief of the other party.

The Court: It was called to my attention some place. I have read so many papers in this case that I think I know the general picture, and I am interested in the evidence on which I am going to have to rule. I will listen to argument [6] after the evidence is in.

Mr. Franklin: Of course, this is a preliminary statement, to familiarize the court with the case.

The Court: I think I know what the case is all about, Mr. Franklin. I don't know what the facts are, though.

Mr. Franklin: Yes. I wanted to state in a general way what we intend to prove.

The Court: May I ask if the plaintiff denies infringement in the defense of validity of the patent?

Mr. Frederick S. Lyon: That depends, your Honor, on the construction of the claims. If the claims are broadly construed, without limitation in the very generalities in which they are expressed, we do not deny infringement of claim 1. There are certain other things in other

claims that we do not do, and I wanted to specifically make the answer useful to the court. As you know, in many cases it depends upon the interpretation of the claims first, before you can answer that question, but if the first claim in the patent is broadly construed, then we do not deny infringement.

The Court: Under a narrow interpretation, you do deny it?

Mr. Frederick S. Lyon: Yes.

Mr. Franklin: Is there any denial of the infringement of other claims?

The Court: He says he does deny the infringement of other claims. Claim 1 is the only one as to which he has made any admission, if broadly interpreted. [7]

Mr. Franklin: Well, I don't see any denial of infringement of any of the other claims in there.

The Court: We have spent twenty minutes now and I haven't heard any evidence yet.

Mr. Frederick S. Lyon: It is not our intention to put in any extended evidence on the question of non-infringement. We will probably submit the case solely on the evidence.

Mr. Franklin: In the deposition that was taken before I got into the case, Mr. Kruger was asked what claims he would rely on, and he said he would rely on claims 1; 3, 4 and 5. All those claims are in issue.

I will offer in evidence a certified copy of the patent in suit.

The Clerk: That will be Defendant's Exhibit A.

[DEFENDANT'S EXHIBIT A]

DEPARTMENT OF COMMERCE

United States Patent Office

To all persons to whom these presents shall come,
Greeting:

This Is To Certify that the annexed is a true copy from
the records of this office of the Printed Specification and
Drawing, in the matter of the

Letters Patent of
John McK. Ballou, assignor to
O. H. Kruger,

Number 2,088,567, Granted August 3, 1937,
for

Improvement in Identification Cards.

In Testimony Whereof I have hereunto set my hand
and caused the seal of the Patent Office to be affixed at
the City of Washington, this twenty-eighth day of
August, in the year of our Lord one thousand nine hun-
dred and forty-four and of the Independence of the
United States of America the one hundred and sixty-ninth.

[Seal]

Conway P. Coe

Commissioner of Patents.

Attest:

Harry C. Spillman

Chief of Division.

Aug. 3, 1937.

J. MCK. BALLOU

2,088,56

IDENTIFICATION CARD

Filed Oct. 22, 1934

FIG. 1.

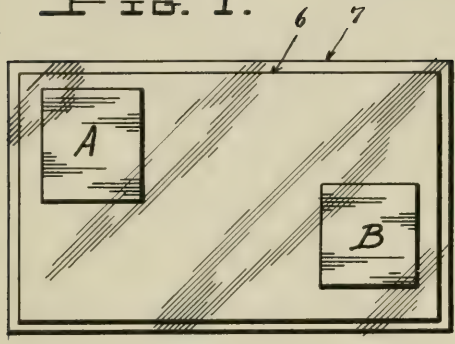


FIG. 2.

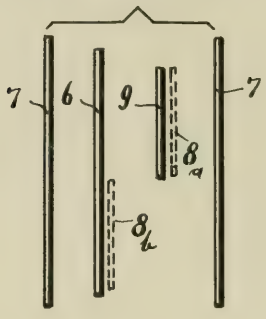


FIG. 3.

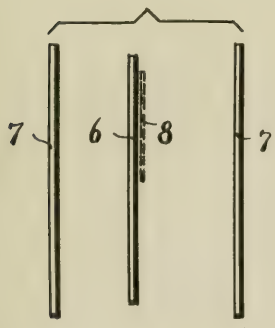


FIG. 4.

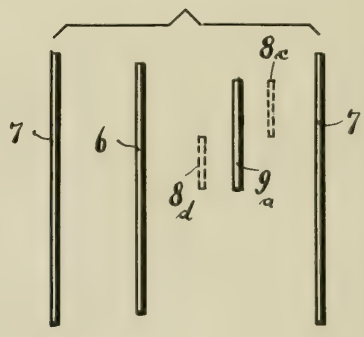
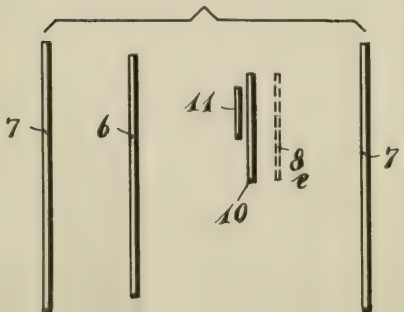


FIG. 5.



INVENTOR:

JOHN MCK. BALLOU,

Patented Aug. 3, 1937

2,088,567

UNITED STATES PATENT OFFICE

2,088,567

IDENTIFICATION CARD

John McK. Ballou, Los Angeles, Calif., assignor
to O. H. Kruger, Los Angeles, Calif.

Application October 22, 1934, Serial No. 749,470

5 Claims. (Cl. 40—2.2)

This invention relates to devices used by an individual person for the sake of identification before, or to, or with another person.

One of the objects of this invention is to provide an identification in a card that is destructible by anything by which the card may be destroyed.

Another object is to provide means by which a destructible identification can be kept from transferring to or from being copied upon the surface of a background while the identification is being destroyed.

Another object is to provide means by which an easily distinguishable mark is left upon any background when the identification is destroyed upon such background.

Another object is to provide means whereby the identification will at least appear in a distorted manner upon any background upon which the identification has been destroyed.

Other objects will appear from the following description and appended claims as well as from the accompanying drawing, in which—

Fig. 1 is a front elevation, roughly outlining an identification card of the type of this invention.

Fig. 2 is an illustration showing the different members of the card in a separated condition in edgeview.

Fig. 3 is a similar illustration of a slightly modified form.

Fig. 4 is another similar illustration of a furthermore slightly modified form.

Fig. 5 is a similar illustration of a still further slightly modified form.

In order that an identification may be considered positive and reliable, it must contain something that is original and distinctive with or by the holder, securely arranged so that it cannot be altered by anyone for any misrepresentation.

A positive and reliable identification should furthermore be in a form to be quickly and readily recognized as such.

With the above in view, the identification card proper 6 is disposed under a transparent cover 7. The cover is preferably made of a material, such as celluloid, that can be dissolved in certain solvents, and any identification matter on or in the card is preferably made or constituted of matter, such as ink or coloring, that will also dissolve by means of the same solvent, so that an application of such a solvent will result in a destruction of the identification on a removal of the cover by the solvent.

Of course, different transparent materials may be used other than of celluloid, and such different materials may be dissolvable by different solvents, but the point is that the identification matter will always be made of a medium dissolvable by the same solvent by which the cover can be dissolved, so that no identification matter will be left on any attempt of dissolving the cover for the sake of obtaining the identification for misrepresentation or alteration.

In Fig. 3, for instance, 8 designates certain identification matter applied to the card 6, to be covered by the members 7. Making the matter at 8 of a material that will be dissolved by the same solvent that can dissolve the cover 7 leaves nothing on or in the card 6 that could be used over again by a forger.

Such matter may be varied according to requirements in particular cases, or tastes of users, or different conditions that cannot all be recited here but that will readily be realized from the teachings in this application. The matter 8, for instance, may be in form of a trade-mark, readily distinguished, or made according to certain laws that may be provided for such purposes, or the matter 8 may be in form of a photograph, or a signature, but any such matter is specially produced, developed, arranged, or otherwise made to appear in the card proper by such means, ink or other matter or medium, that will dissolve by the same solvent that does dissolve the transparent cover, regardless of the type of cover used, with respect of the particular material in the cover.

Having such matter firmly and securely held with respect to the encased card under such cover, prevents the use of such matter for the purpose of any forgery, inasmuch as the matter cannot very well be used while under such cover for making any new duplicate for a cut to be used for re-prints, and the sealing under the cover is produced so that the card with the matter cannot possibly be removed from the cover for forgeries in any other manner.

It must be understood that the cover is firmly secured to the card by any suitable known process, whereby a removal of the cover will cause the mutilation or marring of the face of the enclosed card or of the matter on the card so that such matter can never be obtained in any shape or form perfect enough for any unauthorized use or forgery.

In Fig. 1, A and B designate places where such matter may be arranged in form of a picture, trade-mark, or in other distinguishing controlling

matter, in a form dissolvable with and by the same solvent that will dissolve the cover.

The modified form illustrated in Fig. 2 serves merely to make the distinguishing controlling matter more secure against forgery, and more secure against any attempt for removal from the enclosing covers. The matter 8a in this form is mounted or provided on a special sheet 9. This sheet is either firmly secured to the face of the card proper 6 or may just as well be merely inserted between the encased card 6 and the corresponding cover 7.

The sheet 9, however, is preferably made of a material that will not at all or at least not readily dissolve by the solvent that may dissolve the cover.

This feature has the advantage that the distinguishing controlling matter, or identification, during the dissolving of the cover will not trace itself upon the face of the card proper; while, with no such sheet, someone might be able to develop a system or process to trace or reproduce the matter 8 upon the face of the card proper during or on dissolving the cover.

The matter 8b, also indicated in Fig. 2, may, regardless, designate some identification matter directly on the card, but, of course, also of a type that will dissolve together with the cover.

The above should not mean that no common printing matter could or should be used in or with the present identification card, or with the specially produced distinguishing controlling matter that will dissolve with the dissolving of the cover, but such common printing matter, again, is protected against forgery by the non-forgeable co-operating distinguishing controlling matter.

In Fig. 4 is another slightly modified form, in which half of the matter is provided on one side of the sheet 9a, as indicated at 8c, and the other half of the matter is provided on the opposite side as indicated at 8a.

The sheet in this case must, of course, be of transparent form, such as Cellophane, nevertheless, a dissolving of the cover will result in a distortion of the matter no matter where it may be left or traced. However, while in proper form, the transparency of the Cellophane, if such is used, will allow a proper appearance of the complete matter through or under the intact cover.

A still further modified form illustrated in Fig. 5 provides a blot of black or dark form, made of a material that will partly dissolve by the solvent that can dissolve the cover, to such an extent that the blot will expand or appear blurred sufficiently to extend beyond the edges of the sheet 10, the blotting material being indicated at 11, while the matter 8a may appear in the usual manner on the front face of the sheet 10, this sheet 10, of course, to be of a material dissolvable by the solvent.

From the above it must be understood that the main principle involved is to provide an easily distinguishable appearance with distinct and clear-cut outlines when and while in undisturbed form and condition, which, however, will result in just as readily distinguishable appearance of an unclear blurred outline, or distorted, when tampered with, the whole identification with distinguishing controlling matter being encased whereby a forging is made practically impossible.

In case that the matter is made in form of a photograph, it must be understood that the

photograph is produced on a film of material that will be dissolved with the solvent that can dissolve the cover. Assuming, for instance, 8a in Fig. 2 to represent a photograph, such a photograph will become dissolved with the cover as soon as the solvent reaches it. The sheet 9, in this case, prevents a tracing, above referred to, that by a suitable process might be attempted to be made from the matter at 8a to the card proper 6 while dissolving the cover. A tracing 10 of this sort might be attempted for the sake of getting a distinguishing controlling matter on the card in case where a forger intends to substitute his own photograph to appear with such traced distinguishing controlling matter as if originally produced together, and therefore as a genuine and proper identification, which, however it would not be.

The material of the sheet 9, 9a, on the other hand is meant to be of a type to be insoluble or impervious to the solvent that will affect the cover, the material of such sheet to be such as aluminum, Cellophane, metal foil, or any other similar suitable base, depending on the material of the cover, the material of the sheet not to be dissolved by any solvent that will dissolve the particular cover used in different cases.

The blot 11, also, may be of a certain solid or semi-solid form, normally disposed loosely or firmly secured between the other members of the completed identification card; and, of course, this blotting, blurring, and distorting material 11 may as well be directly under a photograph-film without any impervious sheet 9. It should furthermore be understood that the matter 8b serves as a distorting medium with respect to the distinguishing controlling matter 8a, so that a dissolving of the controlling matter or of any photograph or other identifying matter of the holder of a card of this sort will be clearly indicated by a distortion of matter at 8b, naturally surrounding such other matter or being near enough to be acted upon by any solvent that might be used on such identifying matter.

It should then be understood that the different and several members or details of such an arrangement are placed one on top of the other prior to being adhesively pressed into the cover, and, while so placed, preparatory to being adhesively pressed into the cover, may be treated with adhesive matter individually to adhere to one another or the different parts or members or details may just be held in place within the adhesively united cover without being individually glued together in any way or manner. From the above it should be understood that the extremely distinct separations of the materials are illustrated of discernible thicknesses only as a matter of complying with the requirements of the patent laws, and that, in fact, such separations do not exist in all cases so clearly discernibly, as, for instance, in case of mere ink or similar matter, such as a trade-mark, as clearly and more fully set forth hereinbefore, in which case the matter 8a may very well be the sensitized surface of a film, which may be represented by or in the sheet 10, which, in such a case, or under certain requirements, may again be extremely thin so that the blot-material will be reached readily and quickly after any attack by a solvent upon the matter 8a.

Having thus described my invention, I claim:—

1. In an identification card, a cover that may be dissolved by a certain solvent, a card proper

2,088,587

3

disposed under the cover, and distinguishing matter made to dissolve by the same solvent and associated with the card and the cover so as to disclose tampering with the card to the extent of reaching the matter by means of such solvent through distortion of the matter by the action of the contacting solvent.

2. In an identification card, a cover that may be dissolved by a certain solvent, a card proper disposed under the cover and adhering thereto, distinguishing matter on the card made of a medium dissolvable by the same solvent by which the cover may be dissolved, and means disposed to produce a distorted appearance of a portion of the card upon being reached by the solvent.

3. In an identification card, a cover that may be dissolved by a certain solvent, a card proper disposed under the cover and adhering thereto, distinguishing matter on the card made of a medium dissolvable by the same solvent by which the cover may be dissolved, and means normally cov-

ered by the matter and arranged to produce a distorted appearance under the cover upon being reached by the solvent.

4. In an identification card, a cover that may be dissolved by a certain solvent, a card proper disposed under the cover, distinguishing matter under the cover and appearing on the face of the card when the card is incased, the matter being made of a medium also dissolvable by the same solvent by which the cover may be dissolved, and means associated with the matter to produce a distorted appearance upon being reached by the solvent.

5. In an identification card, a cover made to dissolve by a certain solvent, a card proper disposed under the cover, distinguishing matter under the cover and made to dissolve by the same solvent, and means to disclose any tampering with the card to the extent of reaching the matter by means of such solvent.

JOHN McK. BALLOU.

No. 3116-BH-Civ Whitehead vs. Kruger Defts Exhibit A Filed Sep 7 - 1944 Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[Endorsed]: Filed Mar. 19, 1945. Paul P. O'Brien, Clerk.

Mr. Franklin: There was a stipulation that printed copies may be offered in evidence in lieu of certified copies.

The Court: Well, it is in. Proceed.

Mr. Franklin: Yes. I will offer in evidence a certified copy of the assignment of the patent from the patentee, John McK. Ballou, to the defendant.

The Court: Any objection, counsel?

Mr. Frederick S. Lyon: The patent was issued to Mr. Kruger, and this is immaterial.

The Court: You recognize Mr. Kruger as the owner of the patent?

Mr. Frederick S. Lyon: There is no issue of ownership by [8] the defendant of the patent.

The Court: And no occasion to introduce it in evidence?

Mr. Frederick S. Lyon: No.

Mr. Franklin: Very well. During the prosecution of the application for the patent in suit there was a rejection of claim 1. Is that claim 1?

The Court: I have read the file in the Patent Office. It hasn't been introduced in evidence, but it was furnished to me for my previous study.

Mr. Franklin: I haven't got a copy of it.

The Court: Have you any objection to this?

Mr. Frederick W. Lyon: If your Honor please, we would put that in as a defendant's exhibit.

The Court: This will be introduced as plaintiff's exhibit.

Mr. Frederick S. Lyon: The patent is in as a defendant's exhibit.

The Court: Yes.

The Clerk: This will be Plaintiff's Exhibit 1.

Mr. Franklin: There is no file wrapper containing the statement of the court of appeals, and one of the claims was rejected and appealed.

Mr. Frederick S. Lyon: That was in the proceedings in the Patent Office up to and including the issuance.

Mr. Franklin: I don't want to take the time to look for that now, but I have a certified copy of the decision of the [9] Board of Appeals.

The Court: Well, to save time, introduce it as defendant's exhibit next in order.

The Clerk: Exhibit B.

[DEFENDANT'S EXHIBIT B]
DEPARTMENT OF COMMERCE
United States Patent Office

To all persons to whom these presents shall come,
Greeting:

This Is to Certify that the annexed is a true copy from
the records of this office of the Decision of the Board of
Appeals, dated July 1, 1936, being Paper 18, in the
matter of the

Letters Patent of
John McK. Ballou, assignor to
O. H. Kruger,

Number 2,088,567, Granted August 3, 1937,
for
Improvement in Identification Cards.

In Testimony Whereof I have hereunto set my hand
and caused the seal of the Patent Office to be affixed at
the City of Washington, this ninth day of August, in
the year of our Lord one thousand nine hundred and
forty-four and of the Independence of the United States
of America the one hundred and sixty-ninth.

Conway P. Coe
Commissioner of Patents.

Attest:

D. E. Wilson
Chief of Division.

Appeal No. 17,081 Paper No. 18

Decision

[Stamped]: U. S. Patent Office Board of Appeals
Jul - 1 1936 Mailed

Appeal No. 17,081

VFM

IN THE UNITED STATES PATENT OFFICE

BEFORE THE BOARD OF APPEALS

Ex parte John McK. Ballou

Application for Patent filed October 22, 1934, Serial
No. 749,470. Identification Card.

Mr. Otto H. Kruger for applicant.

This is an appeal from the final rejection of claims
6 and 7.

Claim 6 is illustrative.

6. In an identification card, a cover made to dissolve by a certain solvent, a card proper disposed under the cover, distinguishing matter under the cover and made to dissolve by the same solvent, the cover being made to adhere to the card proper and the matter, and means to disclose tampering with the card to the extent of reaching the matter under such cover.

The references relied upon are as follows:

Bensinger	383,272	May 22, 1888
Goodsell et al	1,071,226	Aug. 26, 1913
Done	1,602,396	Oct. 12, 1926
Reese	1,627,407	May 3, 1927

The invention includes the combination of a soluble cover for an identification card which carries a soluble distinguishing character, the parts being connected by an adhesive and means being provided to disclose tampering with the card by means of a solvent which would be used

749470

17,081 — — — — — 2

to remove the cover. The allowed claims cover this invention.

Claim 6, however, is broad enough to cover any means to disclose tampering with the card, it being immaterial according to the claim whether a solvent is used in such tampering. Inasmuch as applicant discloses no means to show such tampering when a solvent is not used, it is believed that the rejection of claim 6 is correct.

Claim 7 relates to an art entirely distinct from any of the references cited against it. Some of these references show the solubility of the ink and film in a common solvent but for an entirely different purpose and the adoption of this idea in the Goodsell et al structure would have no object at all especially since Goodsell makes no mention of the desirability of accomplishing the transfer of the ink to the film for any purpose and certainly not for the purpose stated in claim 7, which is deemed allowable over the references.

The decision of the examiner is affirmed as to claim 6, but is reversed as to claim 7.

Eugene Landers)	
Examiner-in-Chief)	
C. S. Shaffer	)	Board
Examiner-in-Chief	)	of
	)	Appeals
F. G. Porter)	
Examiner-in-Chief)	

July 1, 1936

749470

No. 3116-BH Civ Whitehead vs. Kruger Defts Exhibit B Filed Sep 7 - -1944. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[Endorsed]: Filed Mar. 19, 1945. Paul P. O'Brien, Clerk.

The Court: I have a recollection of reading it some place. It has been a couple of months ago since I read it, and I will have to refresh my memory.

Mr. Franklin: Will you take the stand, Mr. Kruger?
[10]

OTTO H. KRUGER,

called as a witness in behalf of defendant and counter-claimant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Otto H. Kruger.

Direct Examination.

Q. By Mr. Franklin: Are you the plaintiff in this case, Mr. Kruger?

(Testimony of Otto H. Kruger)

Mr. Frederick S. Lyon: No; he is the defendant.

The Court: He is defendant.

The Witness: I am the defendant.

Q. By Mr. Franklin: Will you state your education and background in engineering matters, particularly in the art to which the patent relates?

A. I was graduated in Germany in college, University and engineering college, with the degree of Engineer. After that I held very responsible positions of management in large manufacturers' factories in Germany. As such engineer I manufactured all sorts of machinery for the rubber industry, which is a very similar art as paper manufacturer, in that I knew all of the machinery, apparatus and all that sort of thing that is necessary for it. In that way I was acquainted with paper making as well, and that part of the invention, as far as paper is concerned, or cards, is familiar for that reason; it is very familiar to me. As engineer, I also know chemistry enough that I know where to apply what, and I knew [11] when the inventor came to me what it was all about. I let him merely make a card, with the full understanding of what he presented to me and what I had to prepare.

Q. Are you a citizen of the United States?

A. Yes, sir. I have been in this country for 33 years, and I have been a citizen for 25 years.

Q. Are you a solicitor of patents?

A. Yes; I was registered in the Patent Office about 1920. I have been doing patent work—going back to my experience in Germany, as engineer I very often had occasion to prepare papers over there. Very commonly an

(Testimony of Otto H. Kruger)

engineer prepares the papers. And for that reason I was very much acquainted with patent procedure, and from doing similar work later on here I was very much acquainted with that, so, for that reason, when he applied for a decision, it wasn't very difficult for me to give that. And moreover, as far as the art is concerned in relation to patent registration, in Germany it is customary that a patent will be put open to the public for six months, when a patent has been considered that it may be old prior to the issue and prior to the allowance, and in that way any party can go in the Patent Office and learn a lot and see a lot, and thereby I saw almost any art, or saw anything with reference to paper or anything of that nature. I am not an expert, I would not say, but I have informed myself well in the art.

Q. Have you had any experience in plastics and the [12] plastic industry?

A. Plastics is a very new art, and I wouldn't say experience, I wouldn't call it experience. I know enough—I have read several books on plastics and have really kept up to date in that art.

Q. Can you read mechanical drawings?

A. Of course, as engineer and manager of engineering services, so that I can check anybody else or any other engineer or draftsman.

Q. Did you prepare the specifications and claims of the patent in suit with Mr. Ballou? A. Yes, sir.

Q. And have you recently read over the patent and familiarized yourself with it?

A. Yes; I think I know the patent rather closely. I think I can say that.

(Testimony of Otto H. Kruger)

Q. Do you have a copy of the patent there with you? A. Yes.

Q. Will you state briefly the nature of the invention and the patent, as to what the patent covers?

Mr. Frederick S. Lyon: We object to that, your Honor, as incompetent. In this case the patent speaks for itself and states what it is.

The Court: I think the objection is good. The patent speaks for itself, counsel.

Mr. Franklin: That is true, your Honor, but patents are [13] rather technical, and it is a rather technical invention, and this is an expert witness, and I only wanted to give a brief interpretation of the patent, which I thought would help the court to understand the patent thoroughly.

The Court: I don't know whether I understand it thoroughly. I never examined a patent yet when I felt that perhaps I understood it thoroughly, and my experience has been that counsel is generally in the same position.

Mr. Franklin: Well, I thought possibly a little enlightenment from the man who prepared the patent might help the court and all concerned. I didn't intend to go into it very extensively.

The Court: The patent has to stand on what you have claimed in here, and not what he understood when he drew it. He is bound by his own claim, as far as that is concerned. Claim 1 says:

"In an identification card, a cover that may be dissolved by a certain solvent, a card proper disposed under the cover, and distinguishing matter made to dissolve by the same solvent and associated with the card and the

(Testimony of Otto H. Kruger)

cover so as to disclose tampering with the card to the extent of reaching the matter by means of such solvent through distortion of the matter by the action of the contacting solvent."

I have read the deposition of the patentee, and as to his experiments with various kinds of ink, and, if I remember correctly, he says he first worked out his own kind [14] of ink, and then found out that there was ink on the market that he could buy that was just as good as that he himself made for the purpose of this patent.

Mr. Franklin: Very well.

Q. Have you any of the Western Lithograph cards there? A. I don't know.

Q. Will you step down here and get them for me?

A. Yes.

Q. I will hand you an identification card and ask you if you will state to the court what that is.

Mr. Frederick W. Lyon: May I see that first?

Mr. Franklin: Yes. Here is one of the cards.

Q. By Mr. Franklin: I notice that one end of that card has been removed. Do you know anything about that?

A. Well, that has been done to show that when it is removed the card underneath or between those two covers will be distorted. They have done that for their own purpose, so that when they try to get orders for their cards they can show really the form of it, the form of the card.

Q. Do you know how that was removed?

A. They perhaps used acetone, since it is easier with that than with any of the other solvents. I am not sure—

(Testimony of Otto H. Kruger)

maybe. The turning is of a distinctly lighter shade, and if a man would want to take out part of it he would always have that there that he could never overcome.

Mr. Frederick W. Lyon: If I might interrupt and point [15] out to you that on any of these, on that flashing in there, it shows that along the edge. If you handed a card like that, with that mark on there, to the man at the gate, he would see it right away. It stands out.

Mr. Franklin: What mark are you referring to?

Mr. Frederick W. Lyon: The light blue, where the acetone has been applied.

The Court: What is this Western Lithograph Company?

A. That is my licensee, your Honor, for over two years.

Mr. Franklin: If you will look at the back of this other card, you will see that the number of the patent is there, and the card is manufactured under the patent in suit.

Q. By Mr. Franklin: With that part removed, if you take hold of that card can you pull it out?

A. No, sir.

Q. Is that an important feature of the invention?

A. Of course, that is an important feature, but the distorting feature is the most important.

Q. Is it important that the card be held tightly in between these two sheets of transparent—

A. Yes, it is of importance chiefly because other previously made attempts can be prevented, because it is not really, or it is practically impossible to remove the copper, and any other way one could always make a distortion, but previously there was always still that one

(Testimony of Otto H. Kruger)

feature, that a man could dissolve cards, where such things had not been done, [16] and where an identification was not compounded to have a co-acting feature in itself.

Q. Of course, if that card could be removed in any way, that would defeat the purpose of the invention, would it not?

The Court: Is there anything in the claim that covers that feature, Mr. Franklin?

The Witness: Yes, your Honor.

The Court: No. I am asking counsel. Now, taking claim 1: "In an identification card, a cover that may be dissolved by a certain solvent, a card proper disposed under the cover, and distinguishing matter made to dissolve by the same solvent and associated with the card and the cover so as to disclose tampering with the card to the extent of reaching the matter by means of such solvent through distortion of the matter by the action of the contacting solvent."

As I understand it, claims 1, 3 and 5 are the ones that are in dispute here.

The Witness: 1, 2, 4 and 5.

Mr. Franklin: No. 3 is out.

The Court: But where is there anything in these claims that provides for that—putting heat or pressure or something else with the card to make it almost one substance?

Mr. Franklin: That is in claim 2. Claim 2 states: "In an identification card, a cover that may be dissolved by a certain solvent, a card proper disposed under the cover [17] and adhering thereto."

(Testimony of Otto H. Kruger)

Q. By Mr. Franklin: Will you state how the card is put between those two transparent glasses?

The Court: By heat and pressure, isn't it?

A. By heat and pressure, and claim 1, also reading on the specification, "A cover that may be dissolved by a certain solvent, a card proper disposed under the cover." That is understood when read on the specification that it is under the cover, and it explains how it is associated with the card and the cover. That means, as read under the specifications, secures it in such a way that it cannot be done any other way as far as this patent is concerned. If other people do it any other way, then that is theirs, but as far as this patent is concerned, so only a solvent should be or could be—

The Court: This may be admitted in evidence as defendant's exhibit next in order, so that we will know what we are talking about.

Mr. Frederick W. Lyon: That is the one that has been partially dissolved?

Mr. Franklin: Yes.

The Clerk: Defendant's Exhibit C.

Mr. Frederick S. Lyon: The specifications of the patent in suit, your Honor, page 1, line 45, deal with this question.

The Witness: That deals rather with the side line of security. I don't know whether that is in the copyright I [18] submitted to your Honor at that time with my brief. I had marked certain paragraphs in the specifications. I am not quite sure that I made a mistake and haven't in one or the other of the copies of the brief,

(Testimony of Otto H. Kruger)

perhaps those sections are not marked. But in the brief it is referred to, and I have marked a paragraph on page —

The Court: Let us get the evidence, then I will listen to the argument. We are going along in a very haphazard manner, partly argument and partly evidence. Let me ask this witness a question.

Isn't the essential element of this patent that you are claiming the fact that the card beneath this celluloid material is subject to being dissolved by the same material that dissolves the cover?

A. That is a correct part of the invention.

The Court: What other feature of the invention do you claim is new besides that fact?

A. The feature of having a compound identification that is interacting under the same solvent. In other words, the cover reacts in solvent and is really the controlling factor of all the other solvent features that is now the—

The Court: Just a minute. In this particular card, if the printing matter was not subject to being dissolved by the same material that dissolves the cover, and causes a printed matter to bleed, you wouldn't claim it was infringement, would you? In other words, the fact that they have taken two pieces of [19] celluloid material and clamped them together, with printed matter between them—

The Witness: If the—

The Court: Just a moment. When you dissolve the outside it wouldn't affect the printing matter, if it didn't do that, you wouldn't claim that it was within your patent, would you?

(Testimony of Otto H. Kruger)

A. And if the identification matter were not compounded to the glass and also—

The Court: Not what?

A. That the different parts of the identification, this part of the person's identification, and this part of the person's identification are coacting under the same solvent. A coacting feature, as I say, is absolutely essential.

The Court: That is what I am trying to say in a layman's language; that this card could be put between two pieces of celluloid material, such as we have here, and clamped with heat and pressure, and if the printing matter were not subject to being dissolved by the same solvent that dissolves the cover, you wouldn't claim it was any novel feature, would you?

A. To quite an extent, your Honor.

The Court: Everybody knows, and it is common knowledge, that for years before this patent we have had identification cards that were between two pieces of celluloid material. That is common knowledge. But it seemed to me that if there is any inventive feature involved here it would be the fact [20] that they are all subject to being affected by the same material, in other words, that the cover and the printing matter were subject to being dissolved by the same material.

The Witness: Correct, because that was exactly the way the Appeal Board ruled over the Goodsell patent. The Goodsell patent could be read the way your Honor explained, and the Appeal Board ruled then in my favor, and ruled over the Goodsell patent.

(Testimony of Otto H. Kruger)

Q. By Mr. Franklin: Are you prepared to make a demonstration here of how the solvent would affect the card?

A. That is already admitted. That part is admitted, that the card is affected.

Q. Do I understand that—

Mr. Frederick S. Lyon: We admit that some solvents affect these cards.

The Witness: The cards the way they are now made are affected.

Mr. Franklin: That there are solvents that will dissolve both the covers and the ink.

The Court: I understand the claim is that any solvent that will dissolve the cover will also cause the printed matter to bleed.

Mr. Frederick S. Lyon: If it is a bleeding ink.

The Court: Assuming that the ink is of a certain material.

Mr. Franklin: I see. [21]

Mr. Frederick S. Lyon: We do not admit, however, that there is any one solvent that will dissolve celluloid and all ink.

The Court: I understand that. Maybe I am anticipating, but I have read the deposition of the man that worked out this patent, and first he worked out his own formula for the ink, and later found out that there were inks on the market that were just as useful as the ink that he was using.

Mr. Franklin: Yes, that is true.

(Testimony of Otto H. Kruger)

The Court: In other words, the claim is that it takes a certain type of ink, and it is referred to as an ink that is subject to bleeding or as an ink that is affected by the same solvent that affects the cover.

Mr. Franklin: That is correct.

The Court: That is the way I understand it.

Mr. Franklin: Yes.

The Court: I don't know. If I am incorrect, I would like to be corrected.

Mr. Franklin: That is correct, as I understand it.

Mr. Frederick W. Lyon: Just one correction on that stipulation. We did not stipulate that all solvents on a plastic cover will act on all bleeding inks. Some solvents will dissolve plastic without affecting the ink, any ink. We make that reservation on that stipulation.

The Witness: May I mark that copy? Will that be—

Mr. Frederick W. Lyon: That will be evidence that we [22] will put on.

The Court: Just a moment. Let counsel do the arguing and talking. You are a witness now.

Q. By Mr. Franklin: Will you state the solvents which would ordinarily be used to dissolve both the cover and the ink in the card?

A. As I said, acetone is most commonly used, because it is most easily gotten, but there are quite a number of solvents, but we only use that sort of ink which will be dissolved by the same solvent that dissolves the cover.

(Testimony of Otto H. Kruger)

Q. Then acetone—

A. Acetone is one of them.

The Court: Do you know of any solvent that would dissolve the cover that would not affect the identification card?

A. I believe, your Honor, the expert in chemistry could say that better than I.

Mr. Franklin: Will counsel stipulate that any acetate solvent will dissolve both the cover and the printing ink?

Mr. Frederick S. Lyon: No.

Mr. Frederick W. Lyon: It positively will not. There are some solvents that will.

Mr. Franklin: Our expert will testify to that.

Q. By Mr. Franklin: The Western Lithograph Company is producing these cards as your licensee?

A. Yes, sir. [23]

Q. For how long has that company been your licensee?

The Court: Of what materiality is this?

The Witness: Since December, 1942.

Mr. Franklin: It shows that he has a licensee, and it shows respect for his patent, and I think that would have some bearing on the matter, because no one would pay a license under a patent that didn't consider it—

The Court: Well, the court believes that there are thousands of people that are paying tribute to holders of patents who do it rather than face litigation, and the court doesn't pay too much attention to it. I think it is

(Testimony of Otto H. Kruger)

one of the greatest rackets in the country, myself. I assume, gentlemen, that it is stipulated here that the plaintiffs in this case use a similar method?

Mr. Frederick S. Lyon: It is all covered by the interrogatories.

The Court: And they will be deemed admitted in evidence?

Mr. Frederick S. Lyon: Yes.

The Court: In other words, there is no use of going into that element of the proof?

Mr. Frederick S. Lyon: No, not as far as the plaintiff's case is concerned. We set forth precisely what we do, and there are examples—

The Court: I remember the examples.

Mr. Franklin: At this time, while I think of it, I will offer in evidence the interrogatories and the answers of the [24] defendant.

The Court: It is stipulated that they may be deemed in evidence. Will you so stipulate?

Mr. Franklin: Yes. They are our interrogatories.

The Court: You will stipulate that they may be deemed in evidence?

Mr. Franklin: Yes. What exhibit number will that be?

The Clerk: I will mark the interrogatories as Defendant's Exhibit D and the answers as Defendant's Exhibit E.

[DEFENDANT'S EXHIBIT D]

In the United States District Court
Southern District of California
Central Division.

Civil Action No. 3116-B H

NED WHITEHEAD, doing business under the fictitious
name of WHITEHEAD and COMPANY,

Plaintiff, Counter-Defendant

vs.

OTTO H. KRUGER,

Defendant, Counter-Claimant.

DEFENDANT'S, COUNTER-CLAIMANT'S
INTERROGATORIES.

Interrogatories on behalf of Defendant, Counter-Claimant, Otto H. Kruger to be answered under Oath by Plaintiff, Counter-Claimant, Ned Whitehead, doing business under the fictitious name of Whitehead and Company, pursuant to Rule 33, F. R. C. P.

1. State the elements used and the method of manufacture of the plaintiff's identification card and its envelope, as set forth in Paragraph V of the complaint?

2. Is it not a fact that the printing ink used by plaintiff in his identification card within the six years prior to August 27, 1943 was, and is a commercial product obtainable by you on the open market?

(a) If the answer to the foregoing is in the negative state from whom the ink used by plaintiff in printing said card was obtained.

3. Is it not a fact that the ink used in printing plaintiff's card prior to and since August 27, 1943, stating either or both, is characterized by:

(a) Its ability to bleed when a solvent is applied thereto.

(b) To be dissolved by said solvent when applied thereto.

(c) To be defaced by said solvent when applied thereto.

4. Is it not a fact that the cards submitted by plaintiff in his bill of particulars as Exhibit "C" and "D" are encased or enclosed within an envelope?

(a) State the commercial name of the material used in the making of said envelope and submit one or more samples thereof for use in court?

(b) Is the envelope material used by plaintiff obtainable by plaintiff on the open market?

5. Is said envelope used by plaintiff affected in any manner by a solvent applied thereto?

6. Attached to these interrogatories are two photo-static prints of advertisements marked Exhibits "A" and "B." Admit or deny that said prints are true copies of advertisements which the plaintiff presented to the trade within six years last past.

(a) If your answer to the foregoing is that said advertisements are not yours or not prepared for you, nor authorized by you, then produce for the inspec-

tion of the court and counter claimant all advertisements produced by or authorized by you, or of which you have knowledge relating to identification cards manufactured by or on your behalf and sold or offered for sale within the six years last past, and in respect to your answers to the above state:

(1) The date of publication of each thereof.

(2) The names and addresses of the publishers.

7. Is it not a fact that you have since August 27, 1943, printed identification cards for use of your customers?

8. Is it not a fact that sometime prior to August 27, 1943, you printed or had printed for you identification cards, the printing ink of which did not bleed when a solvent was applied thereto?

9. Is it not a fact that you changed or had changed your method of printing identification cards, by using a printing ink which would bleed when a solvent was applied thereto, after the date of printing the identification cards inquired about in Interrogatory 8?

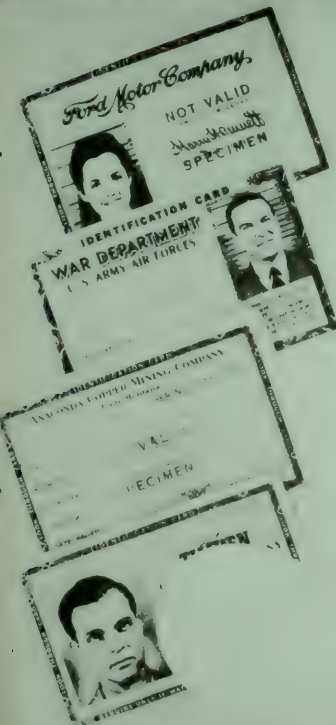
10. State the dates of first printing of cards inquired about in Interrogatories 8 and 9.

11. Why did you in response to Interrogatories 8 and 9 change printing inks?

Alan Franklin

Attorney for Defendant, Counter-Claimant.

WHITEHEAD Counterfeit-Proof IDENTIFICATION CARDS



A few users of Whitehead products and equipment

• Anaconda Copper Mining Co.

• Basic Magnesium Corp
• Bendix Aviation Corp
• Bethlehem Steel Corp
(Fairfield Shipyard Div.)
• Black and Decker

• Calif. Shipbuilding Corp
• Caterpillar Tractor Co.
• Century Electric Co.
• Chicago Flexible Shaft Co.
• Consolidated Aircraft Corp

• Douglas Aircraft Corp
• Firestone Rubber Co.
• Ford Motor Company

• Goodyear Aircraft Corp
• Grumman Aircraft Eng. Corp

• Kaiser Company
(Henry J. Kaiser)

• Lockheed Aircraft Corp

• Glenn L. Martin Co.
• Mack Manufacturing Co.

• National Cash Register Co.

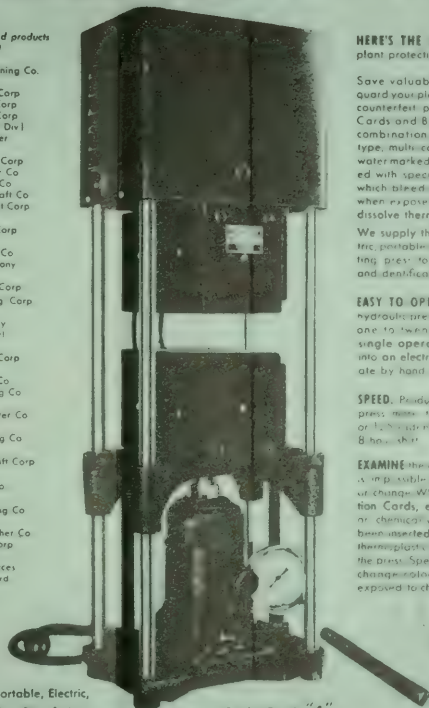
• Oregon Shipbuilding Co.

• Pratt & Whitney Aircraft Corp

• Standard Oil Co.

• Timken Roller Bearing Co.

• Underwood Elliott Fisher Co.
• United Aircraft Corp.
• U.S. Army
• U.S. Army Air Forces
• U.S. Coast Guard
• U.S. Navy



Whitehead Air-cooled, Portable, Electric,
Hydraulic, Laminating Press. (Patents Pending)
Weight 250 lbs. Height 38". Base 10"x13".
Price \$275.00 complete, F.O.B. Los Angeles

HERE'S THE ANSWER to your
plant protection problem

Save valuable time and safe
guard your plant with Whitehead
counterfeit-proof Identification
Cards and Badges made with
combination shadow and wire
type, multi-colored planchets,
water marked paper and engraved
with specially prepared inks
which bleed and change color
when exposed to chemicals that
dissolve thermoplastic

We supply the air-cooled, elec-
tric, portable Whitehead lami-
nating press to use thermoplastic
and identification customers

EASY TO OPERATE This electric
hydraulic press with compression
one to twenty-four units in a
single operation. Simply plug
into an electric outlet and op-
erate by hand. Air-cooled.

SPEED Production rate of each
press more than 1000 badges
or identification cards high speed
8 hours shift

EXAMINE the many ways in which
it is impossible to duplicate with-
out change Whitehead identifica-
tion Cards, either mechanically
or chemically after they have
been inserted between sheets of
thermoplastic and compressed in
the press. Specially designed me-
chanism monitor and detect when
exposed to chemicals



SPECIMEN
IDENTIFICATION CARD

DEFEND YOUR PLANT FROM ATTACK *Within!*

[Exhibit A]

ORDER YOUR ¹EQUIPMENT *today* AND ¹BE ASSURED
OF *Complete Protection...* IN YOUR PLANT!

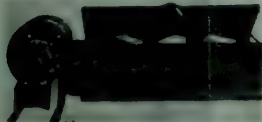
MATERIALS

Whitehead & Company supply all materials necessary to produce Identification Cards or Badges. The lithographed insert cards are made of specially designed counterfeit proof, combination shadow and wire type, multi-colored planchettes, water-marked paper. These are engraved with specially prepared inks which bleed, and change color when exposed to the chemicals that dissolve thermoplastic, thereby preventing alterations. Whitehead special formula Thermoplastic is supplied for lamination.

EQUIPMENT



This electric badge press seals metallic pins to back of badge at the rate of 10 seconds per unit. This equipment must be ordered separately. Price \$75.00



This electric Blower and Wind Tunnel is included with complete equipment necessary to produce Whitehead counterfeit proof identification cards or badges.

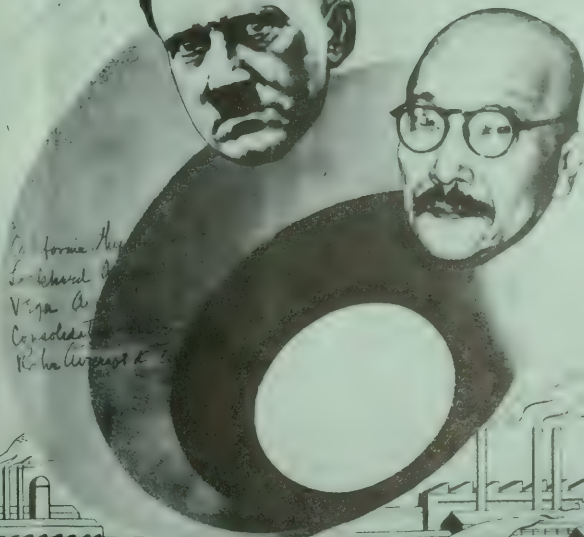
It was necessary for Whitehead & Company engineers to develop precision equipment to produce counterfeit-proof Identification Cards and Badges, and at the same time give maximum efficiency by a simplified air-cooled process. You have no extra expense or use of critical steel for water pipes with this air-cooled equipment. No costly installation problems. This portable Whitehead lamination press can be moved as often as necessary. Whitehead equipment is designed so that the temperature is very accurately and thermostatically controlled, as well as the pressure fixed and predetermined during the lamination process. In addition to the Whitehead portable, electric laminating press, we supply an auxiliary electric Blower and Wind Tunnel for controlled cooling during the lamination process. Complete equipment available with an initial order for Whitehead Counterfeit-proof Identification Card inserts and Thermoplastic. Whitehead equipment operates most efficiently when Whitehead special formula Thermoplastic is used.

PRICES AND TERMS

Complete set of equipment \$275.00 Includes Whitehead Lamination Press, Electric Blower and Wind Tunnel, and all necessary accessories. Thermoplastic and insert identification card prices quoted according to size and quantity. Terms F. O. B. Los Angeles 30 days net.

EXHIBIT "B"

KEEP THEM OUT!



WHITEHEAD & CO IDENTIFICATION CARDS • THERMOPLASTIC
PORTABLE LAMINATING PRESSES
6628 SANTA MONICA BLVD. • LOS ANGELES, CALIFORNIA

No. 3116-BH Civ Defts Exhibit D Filed Sep 7 - 1944
Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[Endorsed]: Filed Aug. 24, 1944.

[Endorsed]: Filed Mar. 19, 1945. Paul P. O'Brien,
Clerk.

[DEFENDANT'S EXHIBIT E]

In the United States District Court
Southern District of California
Central Division

Civil Action No. 3116-B H

NED WHITEHEAD, doing business under the fictitious
name of WHITEHEAD AND COMPANY,
Plaintiff, Counter-Defendant

v.

OTTO H. KRUGER,
Defendant, Counter-Claimant.

ANSWER TO DEFENDANT'S, COUNTER-
CLAIMANT'S INTERROGATORIES

Comes Now the plaintiff, Ned Whitehead, and answers
Defendant's, Counter-Claimant's Interrogatories as fol-
lows:

1. The elements used are two sheets of thermoplastic
called cellulose acetate, a piece of paper having printed
data thereon; the ink with which the data is printed bleeds
and changes color when a solvent for the plastic is ap-
plied. The method of manufacture is to place the piece

of paper between the two sheets and place the same in a hydraulic hot platen laminating press.

2. Yes.
3. (a) Yes.
(b) Will not always dissolve completely.
(c) Yes.
4. Yes.
(a) cellulose acetate. (See Exhibit A)
(b) Yes.
5. Yes.
6. Yes.
7. Yes.
8. Not intentionally.
9. No.
10. November 14, 1941.
11. No answer required in view of answer to Interrogatories 8 and 9.

Signed this 1st day of September, 1944.

Ned Whitehead

State of California,
County of Los Angeles—ss.

Ned Whitehead, being duly sworn, deposes and says that he has read the above Answers to Defendant's, Counter-Claimant's Interrogatories, and knows the contents thereof; that the same is true of his own knowledge, except as to such matters alleged to be upon information and belief, and as to such matters he believes the same to be true.

Ned Whitehead

Subscribed and sworn to before me this 1st day of
September, 1944.

[Seal]

Irene J. Knudsen

Notary Public in and for the County of Los Angeles,
State of California

[Exhibit A]

FORMULA 108

THERMOPLASTIC-FORMULA 108

THERMOPLASTIC



In the United States District Court
Southern District of California
Central Division

Civil Action No. 3116-B H

NED WHITEHEAD, doing business under the fictitious
name of WHITEHEAD AND COMPANY,

Plaintiff, Counter-Defendant,

v.

OTTO H. KRUGER,

Defendant, Counter-Claimant.

AFFIDAVIT OF SERVICE

State of California,
County of Los Angeles—ss.

Alice Marcum, being first duly sworn, deposes and says that she is an employee of the firm of Lyon & Lyon, 811 West Seventh Street, Los Angeles 14, California, attorneys for plaintiff, counter-defendant in the above entitled cause; that she served the attached Answer to Defendant's Counter-Claimant's Interrogatories upon Alan Franklin, attorney for defendant, counter-claimant, by enclosing a true and correct copy thereof in an envelope addressed to

Alan Franklin
114 West Third Street
Los Angeles 13, California

first class postage prepaid, and depositing the same in the United States Post Office this 5th day of September, 1944.

Alice Marcum

Subscribed and sworn to before me this 5 day of September, 1944.

[Seal]

Irene J. Knudsen

Notary Public in and for the County and State above named.

No. 3116-BH Defts Exhibit E Filed Sep 7 - 1944
Edmund L. Smith, Clerk, by MEW, Deputy Clerk

[Endorsed]: Filed Sep. 6, 1944.

[Endorsed]: Filed Mar. 19, 1945. Paul P. O'Brien,
Clerk.

Mr. Franklin: I have a card here with the name of the Whitehead Company on it, and I will ask counsel if you will stipulate if that is one of the cards of Ned Whitehead, the plaintiff in the case.

Mr. Frederick W. Lyon: What do you want us to stipulate now?

Mr. Franklin: If that is one of the cards made by the plaintiff, Ned Whitehead.

Mr. Frederick W. Lyon: We will so stipulate.

Mr. Franklin: And will you stipulate that that would be subject to being dissolved by certain solvents which would dissolve—

Mr. Frederick W. Lyon: Have you the name of the solvent?

Mr. Franklin: We will say acetone, for example.

Mr. Frederick W. Lyon: Yes, we will stipulate that.

The Court: It will be marked defendant's exhibit next in order. [25]

The Clerk: Defendant's Exhibit F.

(Testimony of Otto H. Kruger)

Q. By Mr. Franklin: Do you know the plaintiff, Ned Whitehead? A. Yes, sir.

Q. Is he here in court?

A. Yes; he is sitting there.

Q. This gentleman setting here? A. Yes, sir.

Q. Will you state the occasion of your first meeting with him, and the date? A. Mr. Whitehead—

Mr. Frederick W. Lyon: There is no question here that they have any license, or any question of that nature. I don't see the materiality of it.

The Court: Counsel, it is hard for me to eliminate the facts that are properly or improperly set forth in defendant's pre-trial statement, to the effect that he had negotiated with the plaintiff in this case for a license, and those negotiations were terminated and litigation commenced.

Mr. Frederick W. Lyon: We are willing to stipulate on the record that Mr. Whitehead negotiated and attempted to purchase this patent at one time, but he never offered to pay anything for a license.

The Court: But the result of it would have been that he would have had the right to the use of it?

Mr. Frederick W. Lyon: That is right. [26]

The Court: What other purpose have you in mind, Mr. Franklin?

Mr. Frederick S. Lyon: We might include in that the fact that Mr. Whitehead called off all negotiations.

The Court: Well, they were terminated?

Mr. Frederick S. Lyon: Yes, they were terminated.

(Testimony of Otto H. Kruger)

Mr. Franklin: I think the validity of the patent has been attacked on the ground that it doesn't state the invention sufficiently to enable others skilled in the art to manufacture the device. That is directly in issue. It is obvious that the plaintiff has—

The Court: If you want to show that he worked out his card from information that he gathered from this patent and from the defendant in this case, I will admit it. If you want to show that by reading this patent he was able to proceed, if that is the purpose, I will let you proceed.

Mr. Franklin: Yes, that is the purpose.

The Court: All right. Proceed.

Q. By Mr. Franklin: Will you state the conversation that occurred between you and Mr. Whitehead at that first meeting?

The Court: Let me ask the witness a question. Did Mr. Whitehead start to manufacture the cards that you claim now encroach upon your patent before or after you had talked to him? Was he doing it when you first approached him?

A. From his talk I couldn't get much one way or another, except that he said that he had negotiated with Mr. Ballou [27] for the patent, that he couldn't get along with Mr. Ballou, and he was therefore anxious to negotiate with me, and he said that it would be a good additional feature for manufacture, because he was manufacturing a machine, a little press or something, and he indicated, he expressed that it would be a good additional feature to have this patent.

(Testimony of Otto H. Kruger)

The Court: Did he manufacture the cards himself?

A. From the negotiations there I was kept in the dark.

The Court: Do you know whether he printed—

A. Quite evidently, because of the language between the plaintiff and Mr. Ballou, whereby the plaintiff shows that they were manufacturing the cards at that time—

The Court: Let me ask this question. Maybe counsel can verify it. Did the plaintiff in this case use this particular card before he came in contact with the defendant or the patentee? In other words, what I am trying to determine, is whether or not the plaintiff in this case, from information that he obtained from either Mr. Ballou or the defendant, or the patent itself, proceeded to manufacture this particular card.

Mr. Frederick S. Lyon: The answer to that is this, under the form of the question. Mr. Whitehead was with the Jeffries Printing Company, and—

Mr. Frederick W. Lyon: Jeffries Banknote Company.

Mr. Frederick S. Lyon: The Jeffries Banknote Company—and that company was engaged in printing a card which, under [28] the allegations here, was printed long before he had any contact with either Mr. Kruger or Mr. Ballou, and did not receive the information from either the patent or Mr. Ballou or Mr. Kruger. Does that answer the question?

The Court: Yes. You may proceed, Mr. Franklin.

Q. By Mr. Franklin: Did Mr. Whitehead state that he was—or what did he state he was manufacturing at that time? Did he state that he was manufacturing identification cards?

(Testimony of Otto H. Kruger)

A. He directly wanted the patent to use. I already have said that he, as well as Ballou, both were apparently already making cards before Mr. Whitehead came to me.

Q. Well, did Mr. Whitehead state that he was making identification cards at that time?

A. He didn't state it.

The Court: Do you know whether he was making them? A. I knew it.

The Court: How did you know it?

A. I had several people come around, but I couldn't make any proof of it. I had investigated—

The Court: Do you know whether he is turning out these cards today, of your own knowledge?

A. Yes.

The Court: Is he printing identification cards of the same type as this now?

A. Except that I cannot investigate closely under war conditions, and cards of this type are very much controlled [29] by the government or Navy or Army, or certain parts of the government, and I am not entitled or authorized to make this investigation where I should not be.

The Court: Well, we will take a five minute recess, gentlemen. I wish you would get things lined up and get down to the point.

(Short recess.)

The Court: Proceed, gentlemen.

Q. By Mr. Franklin: What was the date that Mr. Whitehead came to your house first?

A. He came October 8, 1942.

The Court: Counsel, the plaintiff has offered to stipulate that there were negotiations for the purchase of

(Testimony of Otto H. Kruger)

this patent, that there had been negotiations, and then they were eventually terminated and litigation followed. Is that sufficient to cover what you want to cover?

Mr. Franklin: Not only that, your Honor, but—

Mr. Frederick S. Lyon: We offered him \$10,000 for the purchase of the patent, of the exclusive rights under the patent.

Mr. Frederick W. Lyon: The witness has already stated that he doesn't know what Mr. Whitehead was manufacturing before this conversation, so he couldn't testify whether or not Mr. Whitehead received the knowledge from him or the patent, or anywhere.

The Court: Well, it wouldn't make much difference where [30] he acquired it, as far as that is concerned. It is a question of whether this is a valid patent and he is infringing it.

Q. By Mr. Franklin: Did Mr. Whitehead make an offer of any amount?

The Court: Aren't you willing to accept the stipulation of counsel? The statement that Mr. Kruger made shows the substance of it. It isn't necessary to go into all the details of the negotiations. The fact that there were negotiations is material, and that is covered.

Mr. Franklin: I think the fact that they made an offer of a certain amount would be material.

Mr. Frederick W. Lyon: We stipulated that we offered him \$10,000 for the purchase of the patent.

Mr. Franklin. I will accept that stipulation. And it is stipulated further that after that Mr. Whitehead manufactured these cards which we have in evidence here as Exhibit F?

(Testimony of Otto H. Kruger)

Mr. Frederick W. Lyon: It is so stipulated.

Mr. Frederick S. Lyon: It is discussed in the interrogatories.

Mr. Franklin: The card we offered here is shown a little mutilated on one end by an acid. I have a card here which is marked "Whitehead & Company," which is complete, and I will ask that that be admitted.

The Court: That is probably a sample card, isn't it?
[31]

Mr. Franklin: Yes.

The Court: He wasn't putting out identification cards for his own use; he was putting them out for the use of others.

Mr. Frederick W. Lyon: We will stipulate that this was manufactured by Whitehead.

Mr. Franklin: I will offer it in evidence.

The Clerk: Defendant's Exhibit G.

Mr. Frederick W. Lyon: It being understood that both of these exhibits are not the actual items that were sold. These are identical with the others, but they are specimens.

The Court: They speak for themselves on that.

Mr. Frederick W. Lyon: Yes, but they have extra printing on them which would not be on the originals.

Q. By Mr. Franklin: In the prosecution of the application for the patent there were certain patents cited by the Patent Office. You are familiar with those, aren't you?

A. Yes, sir.

Mr. Frederick S. Lyon: The record shows that.

(Testimony of Otto H. Kruger)

Q. By Mr. Franklin: You have also made a study of the patents that have been cited by the plaintiff?

A. Yes, sir.

Q. Now, as a patent expert, would you say that the Patent Office cited the closest patents?

Mr. Frederick S. Lyon: We object to that as incompetent, irrelevant and immaterial, and not the best evidence, and [32] leading the witness.

The Court: Well, I think it is a question for the court. I am not much interested in the expert telling me how I am to construe those patents. But isn't this a fact, that there was no patent cited here that had this bleeding ink feature? A. Yes, sir.

The Court: There is not?

A. Yes, sir; there was no bleeding ink feature in any identification card previously.

The Court: Isn't that correct, gentlemen?

Mr. Frederick S. Lyon: When the witness says "identification card," that is correct, except one, and that was not cited.

The Court: That was the fact, wasn't it?

Mr. Frederick W. Lyon: I would like to know the definition of the word "identification card." The patent to Goodsell, for instance, is for an identification card: the card was used for identification.

The Court: Does that involve the ink?

Mr. Frederick W. Lyon: It doesn't state anything about what kind of ink. That is part of the proof we will have to put in. But it states a printed label, under cellophane.

The Court: I am not quite sure that I remember the Goodsell patent.

(Testimony of Otto H. Kruger)

Mr. Frederick W. Lyon: The Goodsell patent is this Red Oak tag. [33]

The Court: Yes. They waterproofed the tag so that it wouldn't be affected by the elements.

Mr. Frederick W. Lyon: Then there was the Walsh and Caprio patent, No. 2,079,641, which specifically names printing ink.

The Court: That wasn't cited in the Patent Office?

Mr. Frederick W. Lyon: No, that wasn't cited.

The Court: I feel that an expert can tell me anything he wants to tell me, but when he starts to make his conclusions as to the effect of certain cited patents, he is intruding upon my function, because, after all, that is something that I am going to have to determine. I know in patent cases they bring on experts who try to tell the court what to do, but I don't pay any attention to it. It is trying at times, but at this time most of the attorneys who try patent cases in my court have stopped the practice, because I look upon that kind of testimony as nothing more nor less than counsel's argument.

Mr. Franklin: Well, an expert only gives his opinion.

The Court: But he can explain the workings of this patent, explain anything about the art, and I am interested, because I am a layman, when it comes to this special art, but when he tells me that a certain patent is in a different field, or that it is not really prior art in so far as his patent is concerned, that is a question for me to pass upon.

Mr. Franklin: We have a case here which is very simple. [34] There are just two elements in the patent

(Testimony of Otto H. Kruger)

claims. And here they set up 17 patents to anticipate a patent that has two elements in it.

The Court: We will argue about that when we get to it. But haven't you made out your prima facie case at this time? You have introduced the patent, and if the so-called infringement of your patent, broadly construed, is upheld— There have been specimens of the work turned out by the plaintiff in the case, and I believe the pleading recognizes the fact that there have been claims made, so that the declaratory relief statute would apply in this case—there is no question about that between counsel—and you come in with a counterclaim and claim this patent is valid and is being infringed and that they are liable for damages. Just what more facts do you want to bring out from this witness? That is what I want to learn. You have spent an hour and a half, and I haven't learned one thing yet that hadn't already been called to my attention in the pre-trial statement, and from a study of it again.

Mr. Franklin: Of course, I had no way to know how well your Honor knows the case, and I am glad to know that you feel that you understand the case so well, and I will say—

The Court: I have asked him some questions as to the nature of his patent and his claim. The only thing I don't know anything about now is what substance will dissolve this celluloid covering and the ink. If there is an art in the [35] ink trade, that chemical or ink art is something that I am in the dark on.

Mr. Franklin: Yes. I will say that we have pretty well established our prima facie case, as I understand it,

(Testimony of Otto H. Kruger)

but there were cited on that question about 17 patents, and it seems that is too many patents to be cited.

The Court: Well, that is their side of the case. I don't know whether there are 17. There might have been 17 patents directly in point. For instance, this bleeding ink is something—the bleeding is caused by the same solution that dissolves the celluloid binder, you might say, or cover of these cards. But whether the plaintiff claims that anybody skilled in the art could have worked this out—you claim that from the language of the patent itself anybody skilled in the art could understand what it means?

Mr. Franklin: Yes.

The Court: The plaintiff claims that the patent is invalid under the statute under which it was filed, because it simply states the problem, without defining the solution.

Mr. Franklin: Well, I will reserve my objection as to the number of patents until later.

The Court: They haven't offered them yet. How can you introduce an objection to something that hasn't been offered?

Mr. Franklin: Well, when it comes up on their proof.

The Court: Well, let us get to that.

Q. By Mr. Franklin: When your deposition was taken, Mr. [36] Kruger, you were asked for certain sketches, and you didn't have them at that time, and you were asked to produce any such sketches.

Mr. Frederick W. Lyon: The deposition of the plaintiff before the trial is ordinarily a fishing expedition, to find out what his case is all about.

(Testimony of Otto H. Kruger)

The Court: Incidentally, I read that, and I was trying to find out all I could about this picture.

Mr. Franklin: Of course, we have got a question of anticipation.

The Court: I will give you plenty of opportunity to put on anything in rebuttal that you want to put on, after they have put on their case. I am pretty free in that. I don't cut anybody out on technical grounds, to prevent them from introducing any evidence that is material to the issue.

Mr. Franklin: There were certain photostatic copies that were attached to our interrogatories.

The Court: Well, the interrogatories are in evidence, and they are attached to it.

Mr. Franklin: Very well, then. I am pretty well along now, and I think we will rest our case.

The Court: Except for cross-examination.

Mr. Franklin: Oh, yes. [37]

Cross-Examination

Q. By Mr. Frederick W. Lyon: Are you familiar with the various plastics used to cover identification cards?

A. I have seen various plastics.

Q. Do you know what plastics are used?

A. Well, mostly now is used cellulose acetate and cellulose nitrate, but there is a cellulose acetate which is mostly used. There are others, for instance, cellulose nitrate. That last is rather explosive, and it is therefore avoided. Besides them, the cellulose acetate, it has sub classes which are also used.

(Testimony of Otto H. Kruger)

Q. Is celluloid used?

A. That is just what I meant to say, that celluloid would not be used much, because it belongs to the nitrate class, and the nitrate class is the cellulose material for explosives, as everybody knows, and very much dangerous.

Q. Celluloid, is that cellulose nitrate?

A. That is nitrate. "Celluloid" or any of those names is merely a trade name of certain companies. There are other companies that have also cellulose nitrate, which is called different names. In Germany more than anywhere else, at first, they have a lot of different names for the the same thing. Different companies have different names for it. They do not all call it "cellulose acetate," and they have different names under which it is bought on the market. You may buy on the market cellulose acetate under different names, and [38] you may think it is something different, and still it is cellulose acetate.

Q. But these are all clear plastics which could be used as a cover in carrying out the designations of the patent?

A. It could be used, yes.

Q. I read you a formula, in which the parts comprise cellulose nitrate 100 parts, camphor 30 to 50 parts, Dibutyl tartrate 30 to 50 parts. Would such a formula form the cover that would constitute the cover called for in the Ballou patent in suit?

A. I would rather leave that to our chemical expert, who is here.

(Testimony of Otto H. Kruger)

Q. Then you have no knowledge of your own?

A. I have knowledge, but I would go to a man and get it. I merely know the formulas have nothing to do with it, as far as I know. For that reason I wouldn't worry about any formulas. I can get the material on the market.

Mr. Frederick W. Lyon: I would like to have the witness instructed to answer whether he knows of his own knowledge.

The Court: I rather infer that he doesn't know. He says that is a matter for a chemist.

Mr. Frederick W. Lyon: Then he went on to qualify it and said he would go to a chemist.

A. I will say that after years of experience I have never relied on my memory for any formula, even the simplest engineering formula. I may know the simplest formula, but I [39] will instantly check before I go and assure somebody about it. Particularly under oath I would not do it. I would then check.

The Court: You cannot answer the question?

A. I cannot. That is a question that is too technical.

Q. By Mr. Frederick W. Lyon: What solvents are there for these various covers, that you know of?

A. That is an expression that is very technical. I know from my notes that methyl acetate, nitrate material, methyl cellulose acetate, ethyl lactate, diacetone ethyl, is even branching out quite a bit.

(Testimony of Otto H. Kruger)

Q. You are familiar with ethyl acetate?

A. Yes, I have tried it, but I wouldn't offhand give the formula. I would look up the formula books before I would make it under oath. As an engineer, I have found the most foolish engineer will not—

The Court: You are not asked or called upon to do more than answer the question.

Mr. Frederick W. Lyon: That is all, your Honor.

The Court: That is all.

Mr. Franklin: Just a moment.

Redirect Examination

Q. By Mr. Franklin: Are solvents that will freely dissolve plastics and bleeding ink, to your knowledge, well known?

A. Yes; they are well known in publications and by experts. [40]

Mr. Franklin: That is all.

Mr. Frederick W. Lyon: That is all.

Mr. Frederick S. Lyon: Did the plaintiff rest?

The Court: I think you have another witness, haven't you?

Mr. Franklin: No; I think we will put on our expert in rebuttal, when they put in their patents.

The Court: All right.

Mr. Franklin: Just a moment. I think I will put our expert on, please. [41]

DAVID HORWITZ,

called as a witness on behalf of defendant and counter-claimant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. David Horwitz.

Direct Examination

Q. By Mr. Franklin: Mr. Horwitz, will you state your education and occupation and qualifications as an expert in plastics?

A. Yes. My education, Toronto University, B. A.; Columbia University, Bachelor of Science; post-graduate university, Doctor of Science; at the present time the manufacture of printing inks for all phases of the graphic arts.

Q. Have you made any printing ink for identification cards? A. Yes, sir.

Q. For whom did you make such ink?

A. For the Western Lithograph Company, primarily.

Q. Primarily? A. Yes, sir.

Q. Anyone else? A. Experimental work for the Jeffries Banknote Company on one occasion; samples which were submitted to the Whitehead Company, also.

Q. That is the Whitehead that is a party to this suit? [42] A. Correct.

Q. Will you state what specifications were given to you in making these inks for printing inks?

A. Yes. They should stand heat and pressure, heat to approximately 400 degrees for approximately a 20-minute period; they should have a degree of permanency that would make them reasonably usable in outdoor ex-

(Testimony of David Horwitz)

posure under the sun, for what might be termed a reasonable length of time, without fading; that they should bleed in a solvent that is used to remove the acetate coating, and that they should also bond to the acetate coating to such an extent that when the coating is split apart it would split the sheet, which has one edge adhering to either side of the acetate.

Q. From these specifications did you produce that ink which was used by the Western Lithograph Company for their identification cards? A. I did.

Q. Which we have in evidence here?

A. Yes, sir.

Q. When you were given those specifications, as an ink expert, one skilled in the art, did you have any difficulty in producing a solvent which would dissolve the back of the cover and also cause the ink to run or bleed?

A. The nature of the solvent to be used in that instance was given to me. I didn't have to work with the solvent. With the court's permission, I might enlarge on that. Those [43] were the specifications I was called upon to meet.

Mr. Frederick S. Lyon: We object unless the specifications are produced. I don't think that is a fact. I fear that that is not in the courtroom. I don't know whether they are secret specifications or not, but if they are going into anything about the specifications, I think the specifications themselves should be produced. I don't know what the materiality of it is.

The Court: I don't know what the materiality is. I am going to overrule the objection. So far, I can't see where it is material. As I understand, this witness didn't work out the formula.

(Testimony of David Horwitz)

The Witness: I didn't have to work out the formula of the solvent. The nature of the solvent to be used was given to me.

The Court: Then what did you work out?

A. I manufactured the ink to meet all the specifications to reach with those solvents.

The Court: You figured out an ink that would be affected by this solvent that was furnished to you?

A. Correct.

Q. By Mr. Franklin: Are you familiar with solvents that would dissolve cellulose acetate or celluloid?

A. Yes.

The Court: As I understand it, your problem, then, was the manufacture of the ink? [44]

A. Correct.

Q. By Mr. Franklin: And, being familiar with those solvents, are you also familiar with how those solvents would act upon a bleeding ink?

A. Right.

Q. Will you state a few solvents, for example, that would dissolve a cellulose nitrate cover or plastic cover, and also ink on a card which is a bleeding ink?

A. Ethyl acetate, acetone, ethyl cellosolve, ethyl butyl cellosolve. I wouldn't want to extent my memory beyond that, because they are highly technical names, and I will let it rest on those four; I won't go beyond that.

Q. Would you say that that was more or less elementary chemistry?

A. For the ink manufacturer—I wouldn't say elementary chemistry—for the ink manufacturer it would be the most simple kind of a task.

The Court: You say that would be elementary in so far as ink manufacturing is concerned. Ordinarily you wouldn't be concerned with that, would you?

(Testimony of David Horwitz)

A. Yes, your Honor. I have here, if I might present it for your benefit, or for counsel's benefit, the specifications that are furnished from which these are made—we don't even have to trust to our own preparation. All master specifications have been furnished by the dry color manufacturers.

The Court: Those inks will— [45]

A. They will bleed, and are alkali and acid resistant and heat resistant. I can present you here with perhaps the best known and most reputable—

The Court: You know, then, as a matter of common experience, that there are things that will cause ink to bleed? A. That is correct.

The Court: But we are concerned here with celluloid covers or a combination. In other words, it is necessary here to have a solvent that will not only dissolve celluloid, a celluloid cover, but at the same time will react upon the paper and the ink. In this case you have not only to act on the writing but also on the paper.

A. I can explain the simplicity of that to your Honor very quickly. No printing ink has yet been made that will withstand the action of acetate solvent. All vehicles that are used in printing ink will break down under the action of any acetate solvent.

The Court: And the ink that was used in there would be affected by the solvent?

A. The vehicle would be affected, the carrier of the pigment. Some of the pigments are resistant to the action of these fluids, but none of the vehicles are, and when you soak a piece of paper that is printed like this in an acetate solvent, you wash out the carrier. You might leave the pigment on the surface, and any further at-

(Testimony of David Horwitz)

tempt to [46] treat that would remove that pigment, because you have washed out the carrier. If you take linseed oil and pigment and grind them together to make a paint, and if you wash that, you wash that dried up paint off of the wall, you wash that pigment off of the wall, and your pigment is coming off.

The Court: The information I am after is this: Suppose that I take the ordinary business card that anybody has and place that card under heat and pressure in this holder, and then these acetates are used on it, as I understand your testimony, it would break down that ink?

A. It might not be directly visible. If you soak this, there is a certain absorption within the fibre of the paper itself, but the fact remains that the vehicles would be washed out. Some of the dry pigment would be within the paper.

The Court: In this card, as I understand it, referring to Defendant's Exhibit C, the breakdown seems to be in the paper rather than in the printed matter.

A. No. You have gone from a blue to a very weak gray.

The Court: That is the paper.

A. I beg to differ with your Honor.

The Court: That is the coloring in the paper, but the printing matter itself—

A. You are referring to the black here now?

The Court: Yes. [47]

A. To the layman that wouldn't be so readily visible. This is made up of a combination of a portion of black and a very easily soluble blue, and the blue is washed out, leaving it virtually a gray. There is no such thing as a totally soluble carbon, of which the black is ordinarily

(Testimony of David Horwitz)

made. To accomplish that we put in a portion of black and a portion of blue.

The Court: In other words, the solvent destroys the pigment on the paper, but lets remain the black printing matter?

A. It just leaves a portion of the black. It looks to me as though there are two impressions on that, that those ruled lines have been imprinted after that one. This is what is known as lithographic, and the other is planographic. The lithographic is what has been affected here. This black is the pure carbon, and there would be no obliteration there at all. It has been disfigured and distorted, but it hasn't been washed out. There are three operations in making that.

Mr. Frederick W. Lyon: I would like to know what solvent he is referring to here. Is it his testimony that all solvents affect all inks?

The Court: You will have an opportunity to cross examine.

Mr. Frederick W. Lyon: I want to know what he is talking about here. [48]

The Court: That is the object of cross-examination.

Q. By Mr. Franklin: Did you say all solvents?

A. No. I said all solvents that will dissolve an acetate sheet will break down any printing ink that was ever [48-A] made.

The Court: Is hasn't broken down this black?

A. Yes, but it wouldn't be perceptible to you, as a layman, but there is a bleeding out out around the edge of it there. This is a very poor test. If the whole thing had been submerged I think you would have found entirely different results.

(Testimony of David Horwitz)

The Court: The point I am interested in is this: Of course identification cards are passed rapidly through the hands of the guards at the gate?

A. That is right.

The Court: And the guard will not examine the ink with a magnifying glass, like you will, to see whether it has been altered, so it has to be something that is perceptible?

A. It would have to be the background.

The Court: As I understand from your testimony, any ink that is placed on a card similar to this would be subject to—

A. Defacement.

The Court: —defacement or bleeding of the printed matter, by any acetate that is strong enough?

A. By any solvent that will dissolve an acetate.

The Court: By any solvent that is strong enough to dissolve an acetate?

A. Yes.

The Court: It is 12:00 o'clock, gentlemen. How long is this case going to take? We have spent two hours on it [49] already.

Mr. Franklin: I am pretty well along.

Mr. Frederick S. Lyon: We have one short witness, and it should not take us more than an hour to put in our testimony.

The Court: At this time we will take a recess until 2:00 o'clock, gentlemen.

(Whereupon a recess was taken until 2:00 o'clock p. m. of the same day.) [50]

AFTERNOON SESSION

2:00 O'CLOCK.

The Court: Proceed, gentlemen.

DAVID HORWITZ

recalled.

Direct Examination Continued

Q. By Mr. Franklin: I would like to go into the methods of how you go about producing an ink to meet the specifications for a bleeding ink.

A. The first requirement there is the nature of the pigment. In this sheet, because it had to withstand a certain amount of heat and pressure, there was a degree of permanency that was involved, and also the bleeding quality, and we take the specifications furnished us by the dry color manufacturers. We make our selection of dry color that would meet those requirements, and we select the vehicle or carrier for that pigment. In this particular instance, one of the requirements was that they had to be able to write over it with pen and ink, so the type of vehicle is of a nature that would permit that. The two are put together, and, in addition, a bonding varnish that will make the printed matter bond or fuse with the acetate under heat and pressure is used. The thing is then ground on a roller mill to the proper consistency and furnished to your printer or lithographer.

[51]

Q. As I understand, you make a comparison of paints, for example—I understand linseed oil is a vehicle in paints?

A. Correct.

(Testimony of David Horwitz)

Q. And a vehicle in the ink?

A. There is a considerable amount of linseed oil varnish in this also.

The Court: In inks?

A. Yes; printing inks are very, very comparable in their set-up. We use the linseed oil varnishes, the better varnishes. If I might explain, on the raw linseed oil there is first the natural grade, and then you get your boiled oil, and then you get your high tones from 50 up to 0, and from No. 1 up to No. 7, which is so thick that you can almost cut it, and the difference is that they are boiled and burnt off. The printing oil manufacturer uses the linseed varnish in its better form. You might compare them, except that ours is ground on a roller mill, and the pigment is so finely dispersed that if you were running a half tone print there would be no danger of the pigment coming off. In both they are mixed in a small mill, and the dispersion isn't near so great, because theirs is applied with a brush, and in printing the ink is so thin that it can hardly be measured. That is really the major difference. They are now using synthetic varnishes in paint and also in ink, and there is considerable similarity. For the information of the [52] court I might say that some of our master colors are bought from the paint manufacturers. Sherwin-Williams is a big paint organization that is selling to the printing industry. They use the same master colors that we do exactly.

Q. By Mr. Franklin: What actually occurs when the solvent is applied to an ink? How does it dissolve the ink?

A. Well, it breaks it down. It might have a tendency in some instances to precipitate the pigment. It cuts the

(Testimony of David Horwitz)

viscosity of the varnish. It thins it right out. I can perhaps illustrate that better by saying that if you take a solvent and you apply it to a painted surface, it will cut that entire painted surface and break it up, and you can wipe it right off, the same way you do with a paint remover.

Q. Does solvent affect the paper?

A. Some might. I wouldn't want to go into that, because I am not sufficiently familiar with the fibre structure of paper. Certain types of solvent might very easily damage it.

Q. How long have you known of solvents which would dissolve a plastic cover like cellulose acetate, and also dissolve an ink?

A. For the past 30 years at least.

Q. Is that well known in the art? A. Oh, yes.

Q. Are there any textbooks that show that?

A. Yes. There is one book by Krieger; there is another book by Wiborg; there are German and British publications [53] innumerable of them, and the paint industries publish textbooks also.

Q. How old are those textbooks?

A. I have used them since 35 years ago, some of them.

Q. Have you any of them with you?

A. I have none of the textbooks with me, no.

Mr. Franklin: I think that will be all.

The Court: I would like to ask a few questions. You say the solvent attacks what you call the finish rather than the printing. In other words, on this card the blue is all printed on there, is it not?

A. It is lithographed on there.

(Testimony of David Horwitz)

The Court: And that is the part that the solvent attacks? A. It attacks that and the border.

The Court: And the border?

A. Primarily, yes. This one has had a third printing operation for these rulings, which is an entirely different process, and no selected ink was used for that, but this background and this border, these inks were fabricated.

Mr. Frederick W. Lyon: You are speaking about—

The Court: Speaking about the card in Defendant's Exhibit C. You say it has been known for a long time, over a great period of years, that there are solvents that would affect ink? That has been more or less common knowledge?

A. Yes. In the label industry, when you come to stick a label on a bottle or a can—that goes back a long ways. [54] The pastes themselves used to have a bad effect. They had the action of alkali. They used to be used on bottles containing alcoholic liquid, perfume bottles. That is an old problem in this business, dating back to the inception of the industry, and there is nothing you can do about that at all.

The Court: In other words, it has been generally known that there was a solvent that would cut printed matter? A. That is right.

The Court: It is also well known, isn't it, that there is a solvent that will dissolve celluloid material?

A. Yes. That also goes back many, many years.

The Court: To a man skilled in the profession there is nothing about the ink combinations here that is unusual?

A. No. It hasn't been unusual for the past 20 years anyway, maybe longer than that. My recollection goes

(Testimony of David Horwitz)

back to the years I was working in the press room, when they were making identification tabs. At the old John C. Moore Corporation in New York City, we were playing around in those days with the fusing together of two parts of celluloid, having a gummed flag of fabric attached to it. That goes back to 1910 and 1911.

The Court: Has there ever been a time when you have before been confronted with the problem of working out an identification card? A. No, sir. [55]

The Court: Is that the first time?

A. This is the first time, to my knowledge, and, if I may elaborate on that a little bit, I have covered the graphic arts field for 40 years now, and there has never been a time or an industry other than the one created by the present emergency that made that kind of thing necessary and essential. In this war they have found this kind of thing completely essential and necessary in the creation of small industries, this identification proposition.

The Court: Is there anything about this, or what is there about this that—

A. I don't believe that anybody before had conceived the idea of a foolproof, forgery-proof identification pocket, and the question was to make them so foolproof that nobody could possibly tamper with them, and that was something new.

The Court: You had not used the—

A. None other than what I have done with the Western Lithograph Company. I have been their service man now for many years.

The Court: Had you used this method before you became licensed under this patent?

A. I don't work for the Western.

(Testimony of David Horwitz)

The Court: You don't work for the Western?

A. No. I am an independent ink manufacturer, but I am also a chemist and a consultant. [56]

Cross-Examination

Q. By Mr. Frederick W. Lyon: Who is your employer?

A. I am vice-president of the Graphic Arts Ink Corporation.

Q. Is that a corporation?

A. Yes, a California corporation.

Q. That company is a manufacturer of inks?

A. We manufacture printing and lithographic inks, inks for the graphic arts industry, generally speaking.

Q. Is it not true that for 20 odd years or much longer that ink problems have had to do with producing a fixed ink?

A. Will you explain what you mean by a "fixed ink"?

Q. An ink that would not dissolve, bleed or leach in alcohol esters?

A. It is still a problem.

Q. You haven't succeeded ever in manufacturing a fixed ink?

A. Not for the printing and lithographic arts, industries, no.

Q. But any ink that was used up to today would bleed or run?

A. Not necessarily. I want to get this clear. I made a statement before, and I want to clarify the thing, if I may. You can absorb into the surface of the paper a sufficient degree of pigment so that that pigment remains after the vehicle has been washed out. Nonetheless, when ink is [57] entirely broken down, it loses its value as a

(Testimony of David Horwitz)

pigment media, because then, in subsequent handling, you have nothing to hold that pigment. We have never succeeded in making an ink that would resist the action of a cellulose solvent. That was what I meant. The question of the bleeding of color is an entirely different proposition. Then we can use a select pigment that will commonly bleed under the action of almost any solvent.

Q. Is it not true that for 20 or 30 years those facts have all been well known, that you just gave? That is not something that you just discovered recently?

A. No.

Q. In other words, an ink that would bleed under these solvents was known? A. Certainly.

Q. And also isn't it true that the manufacture of ink that would not bleed has been a problem in the industry?

A. That is right, and it still is a problem.

Q. Under any solvent? A. That is correct.

Q. It is true, isn't it, that any ink manufactured will be defaced, so that tampering with it would seem, when acetone or ketone are applied to it?

A. No. You can make a non-soluble carbon black, for example, that will bond itself into the fibre of the paper and pigment. If I could elucidate a little bit, you might [58] be able to wash this acetate off, and you would still have a residue of ink on there that might not have been badly defaced, but when you try to build it up again to what it originally was, that is when your troubles would come. They might be able to remove that in fairly good shape, but they would never be able to build it up again. The minute heat was applied to it the red would turn to brown on the paper.

(Testimony of David Horwitz)

Q. Then there is no ink which could be applied, even today, to cards in these cellulose acetate covers, under heat and pressure, which, upon dissolving the cellulose acetate covers, could be re-coated, without destruction of the printed matter?

A. Not without so defacing it that it would be easily recognizable as having been tampered with.

Q. I will show you this photostatic copy of "Handbook of Plastics," and ask you if you are familiar with that text? A. I am not.

Q. I call your attention in that photostat to page 733.

A. Yes.

Q. Where it states, at the bottom, "Cellulose Ester Plastics." Do you agree with the statement therein that—

A. In the first place, I am not a specialist on plastics, and I would be very foolish to take issue with national authorities. I am an ink, varnish and pigment specialist, but not a specialist on plastics.

Q. You are not familiar with the various solvents for [59] cellulose acetate?

A. Yes, I am familiar with solvents, and I remember them.

Q. All of them? A. Not all of them.

Q. There are hundreds of them?

A. Quite a number of them.

Q. You don't know of your own knowledge whether or not all the esters, for instance, that will dissolve cellulose acetate will dissolve the ink?

A. I would say from my experience that they would break—

(Testimony of David Horwitz)

Q. All of them?

A. They all would break down the vehicles that are used in printing ink. I think I could safely say, without a single exception, that they will destroy the fabric construction of that ink.

Q. By the word "acetate" which you have used several times, you mean "cellulose acetate"?

A. Yes. That is a commonly used transparent sheet material.

Q. And where you have used the word "acetate" in which it dissolves the ink, you meant the solvent for the acetate?

A. That is right—ethyl acetate or acetone.

Q. What were the solvents you had to bleed the inks that were required by the Navy in those tests?

A. Those tests were made down at the Navy Base at San [60] Pedro. The solvents that were used were used by the Navy. The tests I made, I made with both acetone and ethyl acetate. What the Navy used I am not sure of.

Q. I wanted what you used.

A. I used acetone and ethyl acetate.

Q. Do you know of any other color of ink but the carbon black you testified to that would not be subject to these—

A. Yes. Any of what is known as the monastral group, and the sulphocyanine colors. We have also a series of tungstated and molybdated colors that are highly resistant. They are recent inventions of the past five or six years.

(Testimony of David Horwitz)

Q. They were not in common use in 1934?

A. The patent for the monastral colors was filed prior to 1934. It is a British patent, and the DuPont Company here was licensed prior to 1934 for its distribution. The tungstated and molybdated colors were originated by the Sinclair and Valentine Company in New York City, and came into fairly common use within the past seven or eight years. Prior to that they had been more or less laboratory experiments. They had been used and tried in a limited number of areas, but they did not come into general use until, you might say, all the bugs were taken out of them. There was some difficulty that had to be ironed out, but they didn't come into general usage until recent years.

Q. And such colors were the exception and not the general rule in the ink business in 1934? [61]

A. In 1934 the monastral blues were beginning to be widely used. They filled a crying need in the industry. They came into immediate use and were widely used.

Q. Was that true as early as 1930?

A. Not in the United States. Monastral blues, I believe, were used in England before DuPont received the license in 1930, and possibly prior to 1930.

Q. Do you definitely say that anything under the lamp black colors that were fixed were unknown prior to 1911?

A. No, I wouldn't want to commit myself, because there had been so much research and laboratory experimentation on that thing that might not have been put into commercial use, that I wouldn't want to go on record.

(Testimony of David Horwitz)

Q. They were merely laboratory experiments, if any were known?

A. If any were known, yes. They were not in general usage, I would say, prior to 1911. May I qualify that, if you please? May I qualify that?

Q. Yes.

A. There are two other colors. There is the ultramarine blue, which is just as permanent as the lamp black, and the Prussian blue also, that could also qualify in the same category as the lamp black. They might not have the same laboratory rating, but they would have been perfectly satisfactory from the standpoint of the printer or lithographer.

Q. Those would not have been bleeding inks? [62]

A. No; they were very stable.

Q. Were they known prior to 1911?

A. Yes; I would say back into the inception of the printing ink industry, from the very first.

Q. Those are what you roughly call blue shades, only two shades.

A. Only in those shades. There is English vermilion, mercury red, and your chrome yellows are also extremely stable and permanent. I went off the deep end when I limited myself to the black.

Mr. Frederick W. Lyon: That is all.

The Court: Did you ever study this patent?

A. The only thing I know about it, I just briefly glanced at some of these things in the attorney's office yesterday afternoon. I didn't make any study of it. I was up there for a little over an hour, and he had a

(Testimony of David Horwitz)

sheath of documents he called to my attention, and I looked at them. I know very little about what is involved here.

The Court: I understand from your testimony that, generally speaking, any celluloid material that can be dissolved or that is susceptible of dissolving, the solvent would also affect the ink?

A. The same solvent would affect the ink, yes, and I think the word "affect" is used advisedly there, because it would affect it in varying degrees. In some instances it will take it out completely, and in others it will take it [63] out in more modified ways, and in other cases it would destroy the fabric of that ink. The ink is no longer the same after it has been hit by that solvent.

The Court: I think that is all.

Redirect Examination

Q. By Mr. Franklin: You say that different solvents affect the ink to different degrees. That being the case, would you say that all solvents that would dissolve cellulose acetate would be sufficient to dissolve the ink in such a way that it would show up on the card to show that it had been tampered with?

A. I would say that any solvent that will take that cellulose acetate off would affect the printed matter there to a degree that it would show tampering.

Mr. Franklin: That is all.

The Court: Any further testimony, Mr. Franklin?

Mr. Franklin: No. That will be all. We rest.

The Court: You may proceed, Mr. Lyon. [64]

(Testimony of David Horwitz)

Mr. Frederick W. Lyon: I will offer as the exhibit next in order certain pages from Handbook of Plastics, by Herbert R. Simonds, by D. Van Nostrand Company, New York, and the pages consist of the title page, pages 733, 734, 774, 775, 776, 777 and 959. The purpose of this offer is to merely acquaint the court with what some of these terms like "cellulose nitrate" and "cellulose acetate," and the various solvents and materials that are used in it are, so that the terms will be familiar.

Mr. Frederick S. Lyon: It is a standard textbook, and we are presenting it so that it will be available to the court.

The Court: Any objection?

Mr. Franklin: What is the date of that?

Mr. Frederick W. Lyon: 1943. We are not using this as prior art. It is a textbook to show what "cellulose acetate" and "celluloid" are.

Mr. Franklin: It is dated after the filing of the patent in suit. I don't see that it is relevant, and I just object on the ground that it is irrelevant and immaterial.

The Court: The patent in suit refers to celluloid?

Mr. Franklin: Yes.

Mr. Frederick W. Lyon: In the description of what the plastic covering is, it refers to it as celluloid, in column 1, page 1, starting at line 47: [65]

"The cover is preferably made of a material, such as celluloid."

We want to show, merely for the purpose of the record, that esters, cellulose nitrate, celluloid, etc., are plastics that could be used and are used for this purpose.

Mr. Frederick S. Lyon: And the patent, at page 2, line 44, refers to "Cellophane."

The Court: Page 2, line 44?

(Testimony of David Horwitz)

Mr. Frederick S. Lyon: Line 44: "The sheet in this case must, of course, be of transparent form, such as Cellophane."

The purpose is not to take the time of the expert simply to define those terms and what they mean.

The Court: I don't know, under the objection here, how the court can admit it.

Mr. Franklin: If your Honor please, as to Cellophane—

The Court: I have an objection before me on the admission of this textbook defining various terms for the education of the court. It is a matter of common knowledge in the art, isn't it?

Mr. Frederick W. Lyon: That is right, your Honor.

The Court: You can give me a reference to that in any brief that may be filed. It will have the same effect. Maybe I can get the whole book then.

Mr. Frederick W. Lyon: Maybe we can just put this in for identification, so that you will have it before you if you [66] want to see it.

The Court: Yes.

The Clerk: Plaintiff's Exhibit 2 for identification.

Mr. Franklin: The defendant's cellophane patent here—

The Court: Let us not argue the matter now. I want to hear the evidence. Proceed, Mr. Lyon, with your evidence.

Mr. Frederick W. Lyon: I offer as Defendant's exhibit next in order the patent to Goodsell and Maynard,

No. 1,071,226. Is there any objection to that being offered?

Mr. Franklin: No.

The Clerk: That one will be Plaintiff's Exhibit 3.

[Plaintiff's Exhibit No. 3 is hereinafter inserted in this Transcript at pages 137 to 140, inclusive.]

Mr. Frederick W. Lyon: And the patent to Wilson, No. 953,081, as Defendant's exhibit next in order.

The Clerk: Plaintiff's Exhibit 4.

[Plaintiff's Exhibit No. 4 is hereinafter inserted in this Transcript at pages 141 to 144, inclusive.]

Mr. Frederick W. Lyon: Any objection to that?

Mr. Franklin: No. If the court please. I referred to the fact that there were about 17 patents set up in this suit, showing the prior art. That seems to be a great many patents.

The Court: If they have 500, they have a right to offer them, haven't they?

Mr. Franklin: I suppose they have, but I know we had a case before Judge McCormick one time, and the other side offered too many patents, and Judge McCormick said, "You ought to be able to anticipate—"

The Court: But that is another lawsuit. [67]

Mr. Franklin: It was done in that case, a more complicated case than this.

Mr. Frederick W. Lyon: I offer in evidence as plaintiff's next in order the patent to Longmessenger, patent No. 1,390,959.

The Clerk: Plaintiff's Exhibit No. 5.

[Plaintiff's Exhibit No. 5 is hereinafter inserted in this Transcript at pages 145 to 148, inclusive.]

Mr. Frederick W. Lyon: And as Plaintiff's exhibit next in order the patent to Kimber, No. 894,664.

The Clerk: Plaintiff's Exhibit 6.

[Plaintiff's Exhibit No. 6 is hereinafter inserted in this Transcript at pages 149 to 152, inclusive.]

Mr. Frederick W. Lyon: And I will offer as Plaintiff's exhibit next in order the patent to Walsh and Caprio, No. 2,079,641.

The Clerk: Exhibit 7.

[Plaintiff's Exhibit No. 7 is hereinafter inserted in this Transcript at pages 153 to 156, inclusive.]

Mr. Frederick W. Lyon: In connection with this patent, as the same was issued after the patent in suit, but was filed more than four years prior, it is to show prior knowledge, for that reason, so that it will not be claimed that the patent as finally issued was not what was filed four years prior.

I will offer as Plaintiff's Exhibit next in order certified copy of the application of Walsh and Caprio, as originally filed in the Patent Office. And also, to make one correction in the printed patent as finally issued, the original application as filed shows that on Plaintiff's Exhibit 7, column 2, where it says "Formula B," there is a misspelled word, "Cellupose nitrate," where the original says "Cellulose." [68]

The Clerk: Plaintiff's Exhibit 8.

Mr. Frederick W. Lyon: I will offer in evidence the depositions of Mr. Ballou and Mr. Kruger, taken on June—

The Court: Mr. Kruger's deposition is not admissible. He is here in court and he has testified.

Mr. Frederick W. Lyon: It is admissible to show any change of testimony.

The Court: He is here. If there was any change you had a right to call his attention to it and ask for an explanation.

Mr. Frederick W. Lyon: All right. Then I just merely offer the deposition of Mr. Ballou.

Mr. Franklin: I object to this. It hasn't been signed. I don't know whether he has read it over, but it hasn't been signed.

The Court: How about that? The deposition has never been signed.

Mr. Frederick W. Lyon: They stated, your Honor, that Mr. Ballou would be here at the trial, so we have not bothered with having it signed prior to this.

Mr. Franklin: I never stated that he would be here.

The Court: Certainly, if the deposition does not bear his signature it is not admissible, counsel.

Mr. Frederick W. Lyon: We will call Mr. Whitehead. [69]

NED WHITEHEAD,

called as a witness on behalf of plaintiff and cross-defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Ned Whitehead.

Direct Examination

Q. By Mr. Frederick W. Lyon: You are the plaintiff and counter-defendant in this case? A. Yes, sir.

Q. You are doing business under the fictitious name of Whitehead & Company?

A. Whitehead & Company.

Q. Will you state your principal business?

A. I manufacture hydraulic laminating equipment and identification cards.

Q. Are you familiar with the various inks used in printing? A. Yes.

Q. The identification cards? A. Yes.

Q. Have you had occasion to request from the ink manufacturers a printing ink?

A. Yes. I went all the way to New York and talked to the leaders in the field for that purpose.

(Testimony of Ned Whitehead)

Q. Are you familiar with the solvents that can be used to dissolve cellulose acetate? [70]

A. Yes. I made tests with a great many of them, of course not all of them, but I have tested many, many of them.

Q. What have you found happens when inks are subjected to these various solvents that you are familiar with?

A. Well, in some cases certain inks will be attacked by the solvents. Take acetone, acetone will attack a great many inks, perhaps hundreds of them, more than any of the other solvents that would dissolve a cellulose acetate cover, which might be laminated.

Q. What happens to inks when other solvents are used?

A. I found inks that acetone would attack, and yet other solvents that would attack the plastic would not attack that particular ink.

Q. Has any manufacturer of inks produced for you an ink that would disfigure under all solvents, such as cellulose acetate, with which you are familiar?

A. No. I have been unable to get a manufacturer to produce such an ink.

Q. I show you a series of cards and ask you to tell me what they are.

A. These are colors that were sent to me as wet samples, which you would put in a roll and roll across paper, and printing press ink would be applied in a press, for instance. I made a great many tests to see how various solvents or chemicals would attack these particular inks, in trying to find out which colors would be the safest to use for [71] identification cards. This readily shows that some particular colors, for example, the green one—I

(Testimony of Ned Whitehead)

might identify it by the number RT-806—while acetone or methol ethyl ketone attacks this particular color of ink and changes its color by doing so, I presume the—frankly I don't know whether the—but anyway, it changes the color, and some of these chemicals change the color the way this shows while other chemicals do not seem to change it at all.

Q. There are certain names on the right-hand column here. Will you tell me what those refer to?

A. Ethyl acetate does not change the color.

Q. What is ethyl acetate?

A. That is an ester generally known. Methol ethyl ketone is a ketone.

Q. Are all those chemicals listed in the solvents?

A. Every one of them.

Q. Cellulose acetate? A. It is a good solvent.

Q. Then from the chart you are referring to now, which has on the left-hand border the statement, "Green RT-806," you would say that methol ethyl ketone would disfigure the ink so that it would be readily recognizable in an identification card which has been tampered with?

A. Yes.

Q. While ethyl acetate and butyl acetate and methyl formate, for instance, would not? [72] A. No.

Mr. Frederick W. Lyon: I offer that as the plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit 9.

Mr. Frederick W. Lyon: Mark it 9-A, please.

The Clerk: Exhibit 9-A.

Q. By Mr. Frederick W. Lyon: What do you find about the card marked "Blue MD-18548," what does that show? A. The same as the green.

(Testimony of Ned Whitehead)

Q. The same chemicals that would disface the color in the green ones, but other solvents do not disface it?

A. Do not change it at all. They are all, generally speaking, the same.

Q. All of the rest of these cards are the same?

A. Generally.

Q. I call your attention to one specifically, "Red RT-814." I call your attention to the fact that the butyl acetate on here, when looked at this way carefully, you can see that it is slightly changed in color. Would that be sufficient to ground a card at a plant?

A. No. This identification card, for example, if this was exposed to the sunlight for 24 hours, it would probably fade more than it is here, because it naturally fades when exposed to the sun. It would probably be almost white by night. And red fades, the color, and particularly blue.

Mr. Frederick W. Lyon: I will offer these as Plaintiff's [73] Exhibits 9-A, 9-B, 9-C, 9-D, 9-E, 9-F, 9-G, and 9-H.

Q. By Mr. Frederick W. Lyon: Summing up your testimony, Mr. Whitehead, it is that you have been manufacturing identification cards for some time?

The Court: For how long?

A. Since January 1, 1942.

The Court: What was your business prior to that time?

A. Manager Jeffries Banknote Company, as a salesman, and 10 years before that I was with an art company.

(Testimony of Ned Whitehead)

Q. By Mr. Frederick W. Lyon: During all that time have you made continuous requests for ink that will bleed in these solvents, from the various companies?

A. Yes.

Q. And no company has ever been able to send you ink that would bleed in even half of the known solvents?

A. No.

Mr. Frederick W. Lyon: That is all.

The Court: What did you start to make—identification cards first, or the machine?

A. Well, the machine, first. I had gotten a patent on that.

Q. You had a patent on the machine, and that was for the making and pressing of the celluloid sheets together?

A. A portable machine that every war plant would put in.

The Court: And how did you come to develop the identification card business? [74]

A. After selling identification cards for 10 or 12 years, to help employees cash paychecks, the same as the old A, B, C Company, one of the big problems in making this identification card was to identify employees, to help them cash paychecks, and one of the big problems was keeping the photograph on the card. And, I don't know just when it was—probably about 1939—I was approached by a firm in town known as the Kirk Manufacturing Company, why not laminate these cards in plastic? And then I conceived the idea of making a portable machine to do the laminating, for each war plant to do their own laminating.

(Testimony of Ned Whitehead)

The Court: What I am getting at is, you are using a card, as you are using the machine, under heat and pressure, whereby the ink on the card is subject to being dissolved by the same material that dissolves the plastic material?

A. Yes; I got that from Kirk. I notice when I first went there that they were laminating menus for the Southern Pacific. This was long—

The Court: That is all. Did you say you introduced this method before you ever heard of this patent?

A. Sure. Kirk was manufacturing it. All the inks bleed more or less. I noticed down there—the thing that interested me was that laminating of menus for the Southern Pacific, and these menus looked entirely as if they were laminated before they were sealed in plastic, and he explained to me that when they were laminating these things the ink [75] bled, to give it a third dimension, and made it much more beautiful, and I realized that these cards would have certain advantages if they had a bleeding ink that would dissolve when you dissolve the plastic.

The Court: That is all.

Cross-Examination

Q. By Mr. Franklin: You said that you went to certain companies to get these inks that bled under certain solvents. Will you name those companies?

A. I said I went to a company. That was Fuch-Lang, in New York. They are a division of the General Printing Corporation.

Q. That was one company you went to?

A. Yes.

(Testimony of Ned Whitehead)

Q. They couldn't make the ink, you say?

A. That would bleed in all solvents, no.

Q. That was the only company you went to?

A. I can remember that—there have been many companies that have called on me and on the Jeffries Bank-note Company, after they knew we were selling an ink. I was only working for Jeffries then.

Q. These colors in these diagrams here were tested without having had an acetate sheet or heat or pressure applied, were they not?

A. That does not make any difference in lamination.

Q. Without the acetate sheet, heat or pressure, you say [76] that doesn't make any difference?

A. Not a bit.

Q. How did you happen to get the inks that were suitable for making this card?

A. I bought them.

Q. Well, you could buy them on the market then?

A. Yes. I wanted to get one that would be dissolvable in all solvents.

Q. Well, you didn't have any trouble to get an ink that would be dissolved by the same solvents that would dissolve the cellulose acetate?

A. That wouldn't be any good for identification cards. How do you know they wouldn't get a solvent that would hurt the ink, and then you wouldn't have an identification card that was foolproof.

Q. You manufacture an identification card where the solvents that dissolve the cover will dissolve the ink; isn't that a fact? A. Not all solvents, no.

Q. But some solvents will? A. Yes.

Q. Acetone, for example? A. Yes, acetone.

(Testimony of Ned Whitehead)

Q. You had no trouble in buying that ink from an ink maker, did you? A. What ink? [77]

Q. Ink that would dissolve in the same solvent that would dissolve the cellulose acetate?

A. Yes, we did.

Q. You had some difficulty?

A. Sure. You can't get it.

Q. Didn't you consult somebody, a chemist, to find out?

A. Fuch & Lang, the biggest in the business.

Q. Do you know William Knapp, an ink man for Jeffries Banknote Company?

A. No, I don't know him. He never called on me.

Q. You worked at the Jeffries Banknote Company?

A. Yes. I was in the sales end of the business. He never called on me.

Q. And you never had any conversation about producing an ink that would bleed in acetone and dissolve the coloring?

A. No. I don't remember talking to him at all. How long ago was this that you are referring to?

Q. I would say around in 1942.

Mr. Frederick S. Lyon: If that is for the purpose of impeachment, I object on the ground that the time, place and circumstances should be stated.

The Court: He already answered the question of fact. The witness said, "When was it?" I don't know why counsel should submit to examination, but he is willing to do so.

The Witness: I wasn't even with the Jeffries Banknote Company then. [78]

(Testimony of Ned Whitehead)

Q. By Mr. Franklin: In 1942?

A. No. I just testified that I started in business for myself in 1942.

Q. What time?

A. January 1, 1942, under the name of Whitehead & Company.

Q. Did you discuss this matter of inks with Mr. Knapp or an ink maker prior to the time that you started to manufacture your identification cards?

A. Certainly. That is why I went to New York, to see the General Printing Corporation, Fuch-Lang printing ink division, their ink chemists.

Q. You had no difficulty in getting the ink that you used for your identification cards?

A. I just testified that he couldn't give me an ink that would bleed in all cases.

Q. But a chemist there made you the ink, did he not?

A. No. They can't make it.

Q. Not in all solvents—I am not talking about all solvents.

A. You said "solvents".

Q. Solvents that will dissolve both the cover, cellulose acetate, and the ink.

A. Read the question back to me again.

(Question read by the reporter.)

A. I have answered it three or four times. [79]

The Court: Just answer the question. Don't talk to me. You are a witness here, and we are not asking for any comments from you. Just answer the question. Counsel will put in any objection that is necessary. Just remember that I happen to be running this court. You

(Testimony of Ned Whitehead)

can run your own place of business, but I am running this show. Is there any question pending?

The Witness: I don't understand the question.

Q. By Mr. Franklin: In your identification cards you use an ink which dissolves in the same solvent that dissolves the cover, cellulose acetate; isn't that a fact?

A. Yes.

Q. How were you able to produce that ink, if nobody could produce it for you, but you did in fact produce it, did you not?

A. No. Fuch-Lang attempted to make me an ink that would dissolve in all solvents that would dissolve the cover, and they have been unable to do so.

The Court: As I understand your testimony, it is that all solvents that affect the cover do not, of necessity, cause those inks to bleed? A. That is right.

Q. By Mr. Franklin: But there are some solvents, such as acetone, that will cause ink to bleed, as well as dissolve the cover, the cellulose acetate: is that correct?

A. Yes. [80]

Q. And you had no difficulty in finding someone to produce an ink of that kind, did you? A. No.

Mr. Franklin: I think that is all.

Redirect Examination.

Q. By Mr. Frederick W. Lyon: Would there be any advantage in an identification card to be soluble in acetate and the ink would disappear in acetone, but in which the cover would be soluble in ethyl acetate, for instance?

A. It would be absolutely worthless.

Q. As far as printing ink characteristics are concerned?

A. Yes.

(Testimony of Ned Whitehead)

Q. Why is that true?

A. An identification card is supposed to identify, and if it is possible to dissolve the cover away and not affect the ink, then you haven't accomplished your purpose.

Q. And the inks used in your cards are ordinarily soluble and will bleed and run or be disfigured in acetone?

A. Yes.

Q. But they will not be disfigured in all of these various solvents, with the cover? A. Unfortunately, no.

Mr. Frederick W. Lyon: That is all.

Recross-Examination.

Q. By Mr. Franklin: Do you put the cards together, that is, put the cards between the transparent sheets, covers, or [81] who does that? A. No, I don't do it.

Q. Just what do you do in the manufacture of these identification cards?

A. I manufacture the laminating equipment; I manufacture the paper, and print the ink on the paper, and I supply that, along with the plastic, on the open market to my customers.

Q. And they put them together; is that it?

A. That is right.

Q. And they put the printed sheet between the two plastics and press them under heat treatment?

A. Yes.

The Court: Do I understand that in your business you make the material from which the various airplane companies, etc., make up their own identification cards?

A. Yes.

(Testimony of Ned Whitehead)

Redirect Examination.

Q. By Mr. Frederick W. Lyon: It is true, though, that you have made numerous of these cards?

A. For samples and for testing purposes, yes.

Mr. Frederick W. Lyon: That is all.

Mr. Franklin: I have nothing further.

Mr. Frederick W. Lyon: That is all. The plaintiff rests.

The Court: Any additional evidence?

Mr. Franklin: There are certain patents which were introduced in evidence, and I want to put Mr. Kruger on the [82] stand to interpret those patents and state what they show. There has been no evidence as to what those patents show.

The Court: Let me ask you a question, gentlemen. Here is a man that manufactures parts. Where is there any infringement?

Mr. Frederick W. Lyon: Your Honor, even the manufacture of one card is an infringement of this patent.

The Court: I know, but he hasn't manufactured them for sale for profit. The defendant certainly couldn't recover anything, because he couldn't show any damage, could he?

Mr. Frederick W. Lyon: We never believed that he could, but at the same time he has been charged with infringement, and we are certainly entitled to determine that point.

The Court: Well, I am willing to listen to that. Proceed. Do you want to put Mr. Kruger on? Proceed. We will have the argument after we have the evidence.

Mr. Franklin: I haven't got the list of exhibits here, and I will ask counsel to give me those.

(Testimony of Ned Whitehead)

The Clerk: Here they are.

Mr. Frederick S. Lyon: I would like to ask the witness one other question, in view of the question your Honor asked, and I think he can answer it there.

Q. By Mr. Frederick S. Lyon: You stated that you do not yourself make these cards for your customers. What is your relation to your customers with regard to such cards?

A. On the back of almost all purchase orders when [83] received from the government or from war plants, there is a place where you guarantee to protect them from any patent infringement.

Q. Is that true about the Lockheed Aircraft Corporation? A. Yes.

Mr. Frederick S. Lyon: That is all.

Mr. Franklin: Now Mr. Kruger. [84]

OTTO H. KRUGER,

a witness heretofore duly sworn on behalf of defendant, upon being recalled in rebuttal, testified as follows:

Direct Examination.

Q. By Mr. Franklin: First take up the Goodsell patent. That is Plaintiff's Exhibit No. 3. Do you find anything in that patent that states that a printing ink is used which will dissolve in the same solvent that might be applied to dissolve the cover?

Mr. Frederick S. Lyon: I object to that on the ground that it is leading and suggestive and not a proper method of proof. The patent speaks for itself. It is not proper testimony.

(Testimony of Otto H. Kruger)

The Court: I think it is stipulated that it doesn't, isn't it?

Mr. Frederick S. Lyon: It does not refer to the character of the ink at all.

Mr. Franklin: This patent is set up as an anticipation of the patent in suit, and they just introduced it in evidence, and they didn't point out any particular thing that—

The Court: Isn't that a matter of argument?

Mr. Franklin: Well, I think it is a matter of interpretation, and Mr. Kruger is a patent expert, and I think we really should have some information on what this patent covers, or at least we ought to make a record. [85]

The Court: The court can read.

Q. By Mr. Franklin: Well, will you state what is the general nature of that invention?

The Court: Isn't that the patent that covers these tags that are used, celluloid or cellophane, where a covering is put around a tree or bush and sealed, so that the name of the trees and bushes would be permanent? Doesn't that cover the subject matter of that patent?

Mr. Franklin: That is the way I look at it.

Q. By Mr. Franklin: That is not an identification card, is it?

Mr. Frederick S. Lyon: We object to that. It is not a proper subject for expert testimony.

Mr. Franklin: I think it is.

Mr. Frederick S. Lyon: If there is anything that is abstruse or needs explanation, electrically or physically or chemically, that is a subject matter for expert testimony. The import of the document as a whole shows what it is.

(Testimony of Otto H. Kruger)

The Court: That is my viewpoint. That is the attitude I take on these patents. Unless there are some technical terms used in the patent, or some art, something that would give me information I can read them pretty well myself.

Mr. Franklin: I understand that, but there are some statements made in some of those patents which we question, and we are prepared to make some demonstrations here.

Q. By Mr. Franklin: That Goodsell patent, was that cited [86] by the Patent Office?

Mr. Frederick S. Lyon: That is objected to, your Honor.

The Court: The record speaks for itself. The file wrapper is in evidence, and it speaks for itself.

Mr. Franklin: Well, that was considered by the Patent Office.

The Court: That does not bind me.

Mr. Franklin: No.

The Court: Gentlemen, I think you are wasting your time with me. I think he should get down to the narrow field of this identification card, where it involves the ink. Now, if this is a patentable subject matter, if you eliminate the ink from it, it is as old as the hills.

Q. By Mr. Franklin: Now, take up that Wilson patent. That is Exhibit No. 4. Have you made any demonstration concerning that patent?

A. Yes; I can demonstrate it, if the court wishes it. In order to demonstrate that that same patent refers to a sizing, it was later on brought out that the writing is put on top of it, and when it is put on top of it it can be washed out without any difficulty, as I can show, but

(Testimony of Otto H. Kruger)

otherwise it would be quite clear. But if we provide a coating of the class referred to in that case, that is, sizing, or of that class, if at any place in that patent it then refers to a chemical for the purpose of removing any part, that becomes ridiculous, or then that patent is invalid, on the [87] ground that chemicals are not necessary, and I don't think that patent should be considered. I merely say that the patent was meant the way it is intended, that it is a sizing, and when it is on the top it is worthless. If it is put on the top of such a coating no chemical is necessary, because common writing can easily be washed off or wiped off with plain water.

The Court: Gentlemen, I think we will take a recess until 3:30.

(Short recess.)

The Court: Proceed, gentlemen.

Mr. Franklin: I understand the court doesn't care to hear any testimony as to what these patents cover, and the other files, that you are sufficiently familiar with them to understand them?

The Court: I don't know that I understand them. I am not going to foreclose you. But I don't need an expert to tell me what the English language means. I am not going to foreclose you. I will pass on it when the time comes. In other words, you are not going to place the responsibility on the court for the witness not telling his whole story.

Mr. Franklin: No. All I wanted to do was to point out certain features of the patent in suit that are lacking in these prior patents.

The Court: Gentlemen, I am going to require briefs in this case, so that I will have them before me. I am willing [88] to have any discussion on that subject matter that counsel desires to offer.

Mr. Frederick S. Lyon: Yes. Of course, that can be brought out in a brief very well, I think to the best advantage and, that being the case, as you say, the patents speak for themselves, and we can point out anything in the patents in our argument or brief that the witness can point out in court. It is a matter of argument, and the parties in the case happen to be a patent attorney and—

The Court: It is just argument, that is all, a form of witness' testimony.

Mr. Franklin: Yes. I don't think I will continue any further on these prior patents, but we will just leave it and bring out those points in our brief, and we will rest our case, close our case now.

The Court: Any additional testimony?

Mr. Frederick W. Lyon: No, your Honor.

The Court: Gentlemen, there are certain comments that I desire to make that may be of aid to you in preparing your briefs. I will give you some things that I am thinking about and have thought about in this case.

While the patent has been referred to as a simple patent, yet it indicates that there has been an improvement here of technique in the making of identification cards which have some features that are quite unique. I am rather amused at the theories of the parties in the case. The defendant, [89] through his expert, offered evidence that any solvent that would affect the covering would also affect the ink. That testimony was undoubtedly offered to show that the patent would be clear to anybody skilled in the art. On the other hand, the plaintiff's testimony was just to the contrary. The thought that I had in mind in listening to the testimony was this, that if the printed matter underneath the celluloid was generally susceptible to the same solvents, then would there be anything to patent? In other words, would there be any discovery? In other words, I assumed in this case that the plaintiff would take the position that if you put the two together, they would naturally be affected by the same solvents. But you each have taken the other horn of the dilemma, so I would like that feature discussed.

I want to say, however, that I am not very much impressed with the position of the plaintiff in this case, and if I can find against him on the law I am going to do it, if I can in good conscience, because the evidence here strongly indicates and has the flavor of using a man's patent or figuring on using it, and then, when he thinks he can beat it, to try it. That doesn't create a very sympathetic state of mind as far as the court is

concerned. You represent the plaintiff, and you have the burden in this case; and you have a burden that the court is going to view without a great deal of sympathy. However, irrespective of that, I will have to decide it on what I consider the law of [90] the case to be. It does appear that, in view of the testimony of the expert for the defendant, who appears to be a very well informed man, that a person skilled in the art on reading this patent would not have any too great difficulty in following it out.

I realize that the claims themselves are borderline claims, as to whether they come within the statutory provision. I have realized that ever since I have read the patent. As I understand the law, those claims must be considered with the evidence.

How long do you gentlemen wish to file your briefs? Really the plaintiff has filed his opening brief, in a sense, in his pre-trial statement, and, while the defendant filed a statement, there is not much of a discussion of the law, but a general indictment of everybody concerned. I feel that perhaps Mr. Franklin should file the opening brief, and that you should reply. I have had your theory of the case before me clearer than I have had the defendant's theory, because of the fact that the defendant has not been represented by counsel.

(Further discussion as to time for filing briefs.)

The Court: I want to dispose of this case while it is fresh in my mind, without having to read the transcript.

Mr. Frederick S. Lyon: Your Honor wishes a transcript filed, do you not?

The Court: I haven't any desire for it, as far as I am [91] concerned. You have a copy of the prior art. I want to say frankly that I am not impressed much by the prior art. In your brief you may be able to bring out something that I haven't observed. As far as the defendant is concerned, in his testimony he didn't offer anything additional to what he had in his opening statement. Otherwise you have the testimony of the expert for the defendant and the testimony of the plaintiff in the case, who is not an expert, because he said he was a salesman until he started in his own business in 1942. Up to that time he was in the sales end of the game. After that he started out on his own, making these machines for the purpose of manufacturing these identification cards.

Mr. Frederick S. Lyon: How much time does the defendant wish for the opening brief?

The Court: If you put it off too long I will have to have a transcript, I will tell you that, and of course you will have to have a transcript eventually, because nobody will be satisfied with what I do with it.

Mr. Frederick S. Lyon: Well, let us have a transcript.

Mr. Franklin: I don't know.

The Court: That is a matter for counsel. I am not requiring it. Sometimes both sides are unhappy, and always one side is; that is certain.

Mr. Franklin: I don't think we care about a transcript.

Mr. Frederick S. Lyon: I want a transcript of Horwitz's [92] testimony, so I will order a transcript of that much of the testimony for the brief.

The Court: Well, it is simple, and yet it isn't so simple. I am frank to say that after I have listened to a case usually I have pretty well concluded what I am going to do with it, unless there is something appears in the briefs to change my mind. In this case, I don't know, as far as this court is concerned. There is much to be said on both sides of the case.

I will give you 15 days to file your brief, and 15 days to reply.

[PLAINTIFF'S EXHIBIT NO. 6]

(Plaintiff's Exhibit 6)

No. 894,664.

PATENTED JULY 28, 1908.

E. KIMBER.

CHECK.

APPLICATION FILED MAR. 26, 1908.

Fig. 1.

7^d

ATTACH HERE FRACTIONAL CHECKS 10 CENTS OR OVER	New York, 190	
	The Blank National Bank	
ATTACH HERE FRACTIONAL CHECKS UNDER 10 CENTS	\$10.00	
	Ten Dollars	
and cents shown by coupons attached		

b a c c c

Fig. 2.

i s

h	60	50	40	30
g	60¢	50¢	40¢	30¢
	60	50	40	30
	60¢	50¢	40¢	30¢
	60	50	40	30
	60¢	50¢	40¢	30¢

Witnesses
Geo. A. Byrne.
Samuel Turley.

Inventor
Emmor Kimber,
By Wilkinson & Fisher
Attorneys

(Plaintiff's Exhibit 6)

UNITED STATES PATENT OFFICE.

EMMOR KIMBER, OF DORCHESTER, MASSACHUSETTS.

CHECK.

No. 894,664.

Specification of Letters Patent.

Patented July 28, 1908.

Application filed March 26, 1906. Serial No. 308,108.

To all whom it may concern:

Be it known that I, EMMOR KIMBER, a citizen of the United States, residing at Dorchester, in the county of Suffolk and State of Massachusetts, have invented certain new and useful Improvements in Checks; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

My invention relates to improvements in checks, and the object of my invention is to provide a check which shall be secure against alteration, and in which the total amount of the check will be shown by the water marks in the paper itself.

In the accompanying drawings; Figure 1 is a view of the face of the check, and Fig. 2 is a face view of a sheet of stamps or coupons adapted to be attached thereto.

The check is made of tinted paper, of such a character that the action of alkalis thereon will destroy the tint, and the printing on the face of the check is done with ink sensitive to acids. The usual way of altering a check is to take out the ink marks by means of an acid or an alkali, to then restore the paper to its original condition by the use of an alkali or an acid, and then write in the desired amount. This cannot be done with a check made according to my invention without detection, because the tint of the check is sensitive to an alkali, and the ink thereon sensitive to an acid. After the ink has been taken out by an acid the application of an alkali to get rid of the effects of the acid and restore the paper to its original condition will destroy the tint of the paper, thus rendering detection easy.

Of course, the materials used may be reversed and the check may be tinted with a substance sensitive to an acid, and the printing done with an ink sensitive to an alkali.

Referring to the drawings, the check is in the main of the ordinary type, bearing at the top a blank number and date and the place of issuance and in the center the name of the bank on which the check is drawn, together with an order for the payment of money and the amount of money.

On the left the check has an extension separated therefrom by a line *a* leaving a space *b*, on the upper part of which space is printed the words "Attach here fractional

checks 10 cents or over", and near the bottom of the space *b* are the words "Attach here fractional checks under 10 cents".

The check is provided with a blank space *c* for the signature. The check is also water marked as follows. Preferably arranged near the top of the check is a water mark *d* giving the name of the bank by which the check is made, and on the body of the check is a water mark, such as *e*, giving the amount in dollars for which the check is made. The paper on which the checks are printed, is made, of course, in long strips, and the water marks are of such a size and placed in such a position that each check will contain a complete water mark showing the number of dollars for which the check is made.

In Fig. 2 is shown a sheet of stamps or coupons *f* separated from each other by a series of perforations *g*, so that they may be readily detached from each other. This sheet is provided with means for attaching the coupons to the main check, preferably by means of an adhesive substance placed upon the back of the sheet of coupons, but any desired method and means of attaching the coupons to the check properly may be used.

Each of the coupons or stamps has printed upon it its value, as shown at *h*, these values running from 10 cents to 90 cents and from 1 cent to 9 cents. Further, on each of the stamps has a water mark, such as *i*, giving the exact value of the stamp or coupon. These sheets of coupons are made of tinted paper sensitive to the action of an alkali or an acid, and the printing thereon is done with ink sensitive to an acid or an alkali, as already described in connection with the check proper.

It results from the construction described that a check will be produced which cannot be altered without detection, and in which the entire amount of the check, both in dollars and cents will be shown in two ways; first by the printing or writing thereon, and second by the water marks on the paper.

Unlike the ordinary check, these checks are made in fixed amounts, one dollar, two dollars, five dollars, ten dollars, twenty dollars, and so on, and if it is desired to increase the amount of the check for convenience in business, this is done by using the coupons and attaching them to the main check.

Having thus described my invention, I

(Plaintiff's Exhibit 6)

894,664

what I claim as new and desire to secure by Letters Patent is:—

1. A check having water marks thereon indicating a specific sum in dollars, with
 5 coupons attached thereto having thereon indications of their face value, said coupons being each water marked so that the entire amount of the check, with coupons attached, in dollars and cents, will be shown by the
 10 water marks on the checks and coupons, said check having a tinted body and having printing thereon, the one being sensitive to an acid and the other to an alkali, substantially as described.
- 15 2. A check having water marked thereon the name of the bank on which it is drawn, and having also water marked thereon the exact sum in dollars for which the check is made, combined with coupons each having
 20 water marked thereon a specific value, and having means for attaching them to the check proper, said check having a tinted
 body and having printing thereon, the one being sensitive to an acid and the other to an alkali, substantially as described. 25
3. A check composed of tinted paper sensitive to an alkali and having water marked thereon the name of the bank on which it is drawn, and also having a water mark thereon designating the exact amount in dollars
 30 of the check, said check having writing or printing thereon made with an ink sensitive to acids, and a series of coupons each having a specific face value, and having means for attaching them to the check proper, each of
 35 said coupons bearing thereon a water mark denoting its value in cents, substantially as described.

In testimony whereof, I affix my signature, in presence of two witnesses.

EMMOR KIMBER.

Witnesses:

A. L. HOUGH,
 W. MAX. DUVAL

No. 3116-BH-Civ Plfs Exhibit No. 6 Filed Sep 7 -
 1944 Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[Endorsed]: Filed Mar. 19, 1945. Paul P. O'Brien,
 Clerk.

[PLAINTIFF'S EXHIBIT NO. 7]

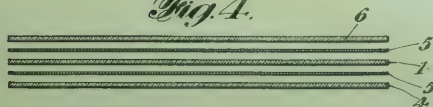
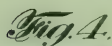
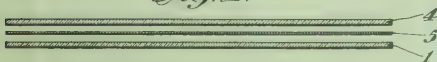
May 11, 1937.

J. F. WALSH ET AL

2,079,641

CEMENTING CELLULOSIC PLASTICS

Filed Jan. 11, 1930



INVENTORS
JAMES F. WALSH
AMERIGO F. CAPRIO
BY
J. Seltzer + B. Levinson
ATTORNEYS

Patented May 11, 1937

(Plaintiff's Exhibit 7)

2,079,641

UNITED STATES PATENT OFFICE

2,079,641

CEMENTING CELLULOSIC PLASTICS

James F. Walsh, South Orange, and Amerigo F. Caprio, Newark, N. J., assignors to Celluloid Corporation, a corporation of New Jersey

Application January 11, 1930, Serial No. 420,156

4 Claims. (Cl. 154-43)

This invention pertains to the general class of cements and particularly to the class of cements adapted for use in cementing cellulosic plastic materials.

Cellulosic plastic sheets, such for instance, as sheets made with cellulose nitrate or cellulose acetate are commonly used for veneering and compositing purposes, and designs, sketches, paintings, drawings, prints, etc. are often covered by the plastic.

In veneering and compositing operations volatile liquid solvents, or liquid cements containing volatile solvents, have generally been used between the surfaces to be joined. Such volatile liquid solvents or cements very often cause blushing, bubbles, and pockets between the composited parts and cause many colors to bleed or run, such as to produce very unsatisfactory results.

An object of our invention therefore, is to provide a cement which will not cause blushing, bubbles, or pockets and will not cause colors to run or bleed.

A further object of our invention is to provide novel means for veneering and compositing.

A further object of our invention is to provide a novel process for veneering and compositing.

A further object of our invention is to provide a novel veneered or composited product.

Many other objects and advantages will become apparent to persons skilled in the art as the specification proceeds.

In the drawing wherein like reference characters are appended to like parts throughout the various figures,

Figure 1 is a perspective view of a colored print.

Figure 2 is a section showing the parts in position ready for compositing the print shown in Figure 1 with a cellulosic plastic sheet.

Figure 3 is a perspective view showing the print composited with a cellulosic plastic sheet.

Figure 4 illustrates the position of the parts for compositing the print between two cellulosic plastic sheets.

Referring to the drawing wherein the parts are illustrated in somewhat exaggerated scale, the print 1 having a paper base, is shown for the purposes of illustration, having an outer colored surface 2.

Print 1 is to be composited with one or more sheets such as sheet 4 of cellulosic plastic. These sheets may or may not carry color, and are, of course, more or less pervious to light when covering parts which are to show through same.

It is assumed for the purposes of illustration that the color or colors of the print 1 have a tendency to run or bleed when the ordinary volatile liquid solvents or cements are used. To overcome this tendency of the colors to run or bleed, we use between sheet 4 and print 1, a cement 5 in sheet form comprising substantially

non-volatile solvents for the cellulosic plastic, preferably combined with at least a small proportion of the particular cellulosic plastic. The presence of at least a small proportion of the cellulosic plastic is particularly preferred where the non-volatile solvents are of an oily nature, in order that the cement may be maintained in sheet or other solid form. The use of a proportion of the cellulosic plastic also aids in producing a final product which is substantially homogeneous throughout, except for the print or its equivalent.

For the purposes of this specification and claims, the term "solid" includes semi-solid and similar forms which are slowly mobile under pressure, and the term "bleeding" includes running, smearing, etc., and the tendency toward same.

The compositing operation is preferably carried on by first using heat and pressure in a press or its equivalent, and then cooling without completely removing the pressure. During this operation the cement 5 which may be relatively thin compared to sheet 4, and which is thermoplastic, becomes a part of sheet 4 and welds sheet 4 and print 1 securely together.

The cement 5 being more or less of a firm nature, does not absorb the color from the print sufficiently to cause a running or bleeding, nor does it flow during the compositing operation sufficiently to cause this effect.

Sheets 5 of cement may be made by any of the processes used in making cellulosic plastic sheets such as mixing of components, preferably with a volatile solvent and flowing on a film wheel, block pressing and sheeting, or extrusion through a die. The sheets 5 may be of any desired thickness. We have successfully used such sheets of cement ranging from 0.005 to 0.030 of an inch in thickness. The cement, of course, may be in any other than sheet form. The finished panel 6 may, of course, be polished or given a matt finish or otherwise processed by any means known in the art.

While we do not limit ourselves to any specific formula for a thermoplastic cement, we find the following produce very satisfactory results:

Formula A

	Parts
Cellulose acetate (preferably of variety soluble in acetone).....	100
Triphenyl phosphate.....	10
Paraethyltoluolsulphonamid.....	25
Dibutyl tartrate.....	25
Triacetin.....	20

Formula B

	Parts
Cellulose nitrate.....	100
Camphor.....	60 to 90

(Plaintiff's Exhibit 7)

2

3,079,641

Formula C

	Parts
Cellulose acetate (preferably of variety soluble in acetone)-----	100
5 Tricresyl phosphate-----	15
Diethyl phthalate-----	25
Triacetin-----	25
Dibutyl tartrate-----	25

10

Formula D

	Parts
Cellulose nitrate-----	100
Camphor-----	30 to 50
15 Dibutyl tartrate-----	30 to 50

The above formulae may be varied as desired and to suit practice, and other known plasticizers may be substituted for those given. However, we prefer not to go below 60 parts of plasticizer to 20 100 parts of cellulose derivative.

While the invention has been described with respect to compositing or veneering wherein either one or more sides of a color carrying member of any base may be covered with a cellulosic plastic, the invention of course includes any operation wherein a soluble, bleeding, or smearing color is cemented within a cellulosic plastic, as well as cementing cellulosic plastics themselves.

Other cellulose derivatives, besides cellulose 30 nitrate and cellulose acetate, which may be utilized, are cellulose formate, cellulose butyrate, cellulose propionate, ethyl cellulose, benzyl cellulose, etc. Of these, we prefer the esters and particularly cellulose acetate. The manufacture of plastics from these materials is known in the art.

The term "compositing" as used in the specification and hereinafter in the claims is to be construed to mean uniting or combining sheets of 40 the same or different materials.

Having described our invention it is obvious that many modifications may be made in the same within the scope of the claims without departing from the spirit of the invention.

We claim:

1. The process of joining objects at least one of which is a cellulosic plastic and at least one of which bears bleeding colors, comprising inserting a cellulosic plastic cement comprising at least 60 parts plasticizer to 100 parts of cellulose derivative between said objects and applying heat and pressure thereto to cement the same into an integral structure.

2. The process of joining objects at least one of which is a cellulose acetate plastic and at least one of which bears bleeding colors, comprising inserting a cellulosic acetate plastic cement comprising at least 60 parts plasticizer to 100 parts cellulose acetate between said objects and compositing the whole into an integral structure by means of heat and pressure.

3. A composite sheet of integral structure comprising a plurality of sheets at least one of which is of a cellulosic plastic and at least one of which bears bleeding colors, said sheets joined by means of a sheet of cellulosic plastic containing at least 60 parts plasticizer to 100 of cellulosic base between each pair of said first mentioned sheets.

4. A composite sheet of integral structure comprising a plurality of sheets at least one of which is of a cellulose acetate plastic and at least one of which bears bleeding colors, said sheets joined by means of a sheet of cellulose acetate plastic containing at least 60 parts plasticizer to 100 of cellulose acetate base between each pair of said first mentioned sheets.

JAMES F. WALSH.
AMERIGO F. CAPRIO.

No. 3116-BH-Civ Plfs Exhibit No. 7 Filed Sep 7 -
1944 Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[Endorsed]: Filed Mar. 19, 1945. Paul P. O'Brien,
Clerk.

[Endorsed]: Filed Oct. 2, 1944. [93]

[Endorsed]: No. 11008. United States Circuit Court of Appeals for the Ninth Circuit. Otto H. Kruger, Appellant, vs. Ned Whitehead, doing business under the fictitious name of Whitehead & Co., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 19, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit
No. 11008

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious
name of WHITEHEAD AND COMPANY,

Appellee.

APPELLANT'S STATEMENT OF POINTS
UNDER RULE 19 (6)

Appellant hereby adopts as his statement of points under Rule 19 (6) of the Rules of the Circuit Court of Appeals his Statement of Points Under Rule 75 (d) of the Rules of the District Court, filed in the District Court of the United States for the Southern District of California, Central Division, on the 17th day of March, 1945.

Dated the 16th day of March, 1945.

HERBERT A. HUEBNER

Herbert A. Huebner

Attorney for Appellant

Received copy of the within this 16th day of March, 1945. Lyon & Lyon, Frederick W. Lyon, Attorney for Appellees.

[Endorsed]: Filed Mar. 19, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER DESIGNATING THE
PORTIONS OF THE RECORD TO BE PRINT-
ED ON APPEAL AND SPECIFYING DOCU-
MENTS AND EXHIBITS TO BE CONSID-
ERED IN THEIR ORIGINAL FORM WITH-
OUT PRINTING.

It Is Hereby Stipulated by and between the attorneys for the respective parties, pursuant to Rule 19 (6) of the Rules of the Circuit Court of Appeals for the Ninth Circuit that the records, proceedings and evidence material for the consideration of the Court and to be printed as the record on appeal in the above entitled matter shall include the following:

1. Complaint filed August 27, 1943.
2. Plaintiff's bill of particulars filed April 12, 1944, including the exhibits therein.
3. Order for summary judgment filed April 17, 1944.
4. Answer to complaint and counter-claim filed April 21, 1944.
5. Answer to counter-claim filed April 28, 1944.
6. Stipulation concerning the admissibility of certain evidence filed September 7, 1944.
7. Defendant's interrogatories filed August 24, 1944, including exhibits attached thereto (Rep. Tr. p. 25).
8. Plaintiff's answers to defendant's interrogatories filed August 7, 1944, excluding the physical exhibits attached thereto (Rep. Tr. p. 26).
9. Memorandum opinion dated October 16, 1944.
10. Findings of fact and conclusions of law signed and filed November 15, 1944.

11. Final judgment filed November 15, 1944.
12. Notice of appeal.
13. Cost Bond on appeal.
14. The entire Reporter's Transcript of Testimony and Proceedings on Trial.
15. Defendant's Exhibit B which is a certified photostatic copy of the decision of the Board of Appeals dated 7/1/36 respecting Letters Patent No. 2,088,567.
16. Stipulation and Order for Records and Exhibits on Appeal in the District Court.
17. Appellant's Statement of Points Under Rule 75 (d) in the District Court.
18. Appellant's Statement of Points Under Rule 19 (6) in the Circuit Court of Appeals.
19. This Stipulation and Order.

It Is Further Stipulated that printed copies of Patent Office drawings and specifications of the following exhibits be used as inserts in the printed record:

Plaintiff's Exhibits:

- (3) Copy of Letters Patent No. 1,071,226.
- (4) Copy of Letters Patent No. 953,081.
- (5) Copy of Letters Patent No. 1,390,959.
- (6) Copy of Letters Patent No. 894,664.
- (7) Copy of Letters Patent No. 2,079,641.

Defendant's Exhibit:

- (A) Copy of Letters Patent No. 2,088,567.

It Is Further Stipulated, subject to the approval of the Court, that the following physical and documentary exhibits be considered in their original form as now on file

herein without duplication or printing, because said physical and documentary exhibits are incapable of duplication in printed form.

Wherefore it is respectfully requested that the Court enter its order permitting the consideration of the following physical and documentary exhibits without duplication in their original form:

Plaintiff's Exhibits:

(1) Photo copy of file wrapper and contents of United States Letters Patent No. 2,088,567.

Exhibit 8—copy of Application of Walsh and Caprio as originally filed in the Patent Office.

Exhibits 9-A to 9-H, inclusive.

Defendant's Exhibits:

(C) Identification card of defendant.

(F) Identification badge of Kaiser Company, Inc. (manufactured by plaintiff).

The Physical Exhibits attached to plaintiff's answers to defendant's interrogatories.

Dated the 16th day of March, 1945.

HERBERT A. HUEBNER

Herbert A. Huebner

Attorney for Appellant

LYON & LYON

Frederick W. Lyon

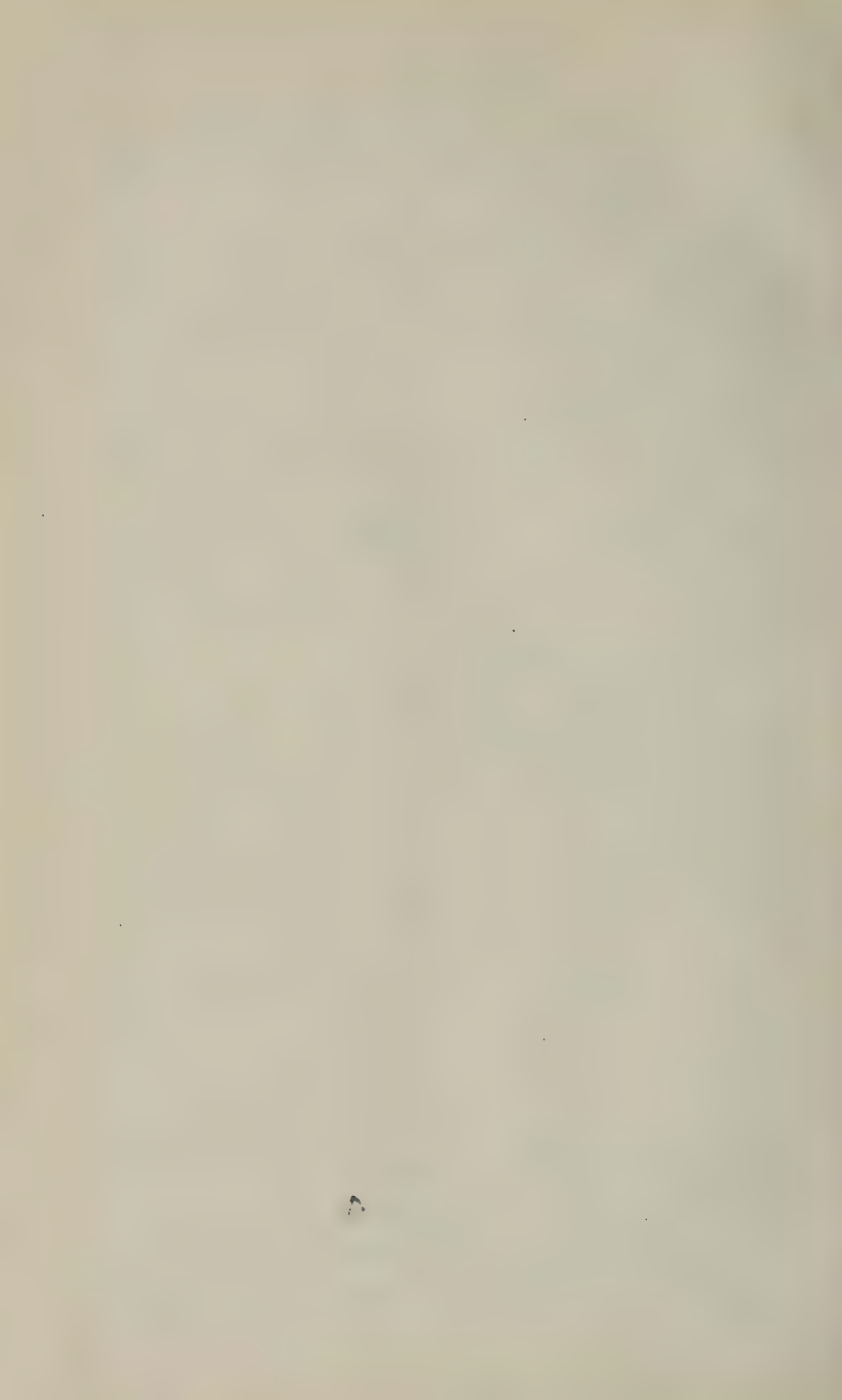
Attorneys for Appellee

Good cause appearing, the foregoing stipulation is hereby approved and it is so ordered.

FRANCIS A. GARRECHT,

United States Circuit Judge

[Endorsed]: Filed Mar. 20, 1945. Paul P. O'Brien, Clerk.



No. 11008

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious name
of Whitehead & Co.,

Appellee.

APPELLANT'S BRIEF.

HERBERT A. HUEBNER,

520 Title Insurance Building, Los Angeles 13,

Attorney for Appellant.

FILED

TOPICAL INDEX.

	PAGE
Jurisdiction	2
Statement of the case.....	2
The questions presented.....	7
The invention	7
Specification of errors relied upon.....	11
Summary of argument.....	13
Argument	14

I.

Appellee had the burden of proof as to invalidity, and did not sustain it	14
1. No pertinent prior art was produced.....	14
2. No expert testimony as to insufficiency of disclosure was offered	15
3. The lower court's observation in its memorandum opinion that the patentee made no discovery is erroneous	20

II.

The patent in issue is fortified.....	23
1. Presumption of validity.....	23
2. Board of Appeals decision.....	24
3. Utilization of the invention by appellee and numerous customers	24
4. Testimony of expert supporting sufficiency of the patent disclosure	26

III.

The patent should be broadly construed because there is no limiting prior art.....	30
--	----

IV.

Infringement is established by appellee's answers to interrogatories, including his own advertisements, and by stipulation of appellee's counsel.....	30
Conclusion	32

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Anraku v. General Electric Co., 80 F. (2d) 958, cert. den. 298 U. S. 678, 80 L. Ed. 1399.....	15
Bankers' Utilities Co. v. Pacific National Bank, 18 F. (2d) 16....	23
Carson v. American Smelting & Refining Co., 4 F. (2d) 463.....	18
Celanese Corp. of America v. Essley Shirt Co., 98 F. (2d) 895..	24
Chester N. Weaver, Inc. v. American Chain Co., 9 F. (2d) 372..	23
Hann v. Venetian Blind Corp., 21 F. (2d) 913, aff'd 111 F. (2d) 455	29
J. A. Mohr & Son v. Alliance Securities Co., 14 F. (2d) 799....	24
Mumm v. Decker, 301 U. S. 168.....	14, 23
Park-In-Theatres v. Rogers, 130 F. (2d) 745.....	23
Payne Furnace & Supply Co. v. Williams-Wallace Co., 117 F. (2d) 823, cert. den. 61 S. Ct. 958, rehear. den. 61 S. Ct. 1095	24
Reinharts Inc. v. Caterpillar Tractor Co., 85 F. (2d) 628.....	23
Schumacker v. Buttonlath Mfg. Co., 292 Fed. 522.....	14, 15, 23, 27
Shakespeare v. Perrine Mfg. Co., 91 F. (2d) 199.....	30
Stoody v. Mills Alloys, 67 F. (2d) 807.....	23
Trane Co. v. Nash Engineering Co., 25 F. (2d) 267.....	24
Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987....	24
Wilson & Willard Mfg. Co. v. Bole, 227 Fed. 607.....	23

STATUTES.

Declaratory Relief Act (Judicial Code, Sec. 274d, 28 U. S. C. A., Sec. 400)	2
United States Code, Title 28, Secs. 41, 371.....	2
United States Code, Title 28, Sec. 230.....	2

TEXTBOOKS.

2 Walker on Patents (Deller's Ed.), p. 1238.....	30
2 Walker on Patents (Deller's Ed.), p. 1273.....	14
3 Walker on Patents (Deller's Ed.), p. 2035.....	15
Webster's International Dictionary.....	21
9 Wigmore on Evidence, p. 285.....	14

No. 11008

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious name
of Whitehead & Co.,

Appellee.

APPELLANT'S BRIEF.

Appellant appeals from the final judgment [25]* of the District Court of the United States for the Southern District of California, Central Division, holding appellant's United States Letters Patent 2,088,567 [44] invalid as to claims 1, 2, 4 and 5. and dismissing appellant's counterclaim for infringement of said patent, without passing on the issue of infringement.

*Throughout this brief, the numbers enclosed in brackets refer to page numbers of the Transcript of Record on Appeal.

Jurisdiction.

This suit arises under the Patent Laws of the United States under which the District Court has exclusive jurisdiction (Sections 41 and 371 of Title 28 of the United States Code), and under the Declaratory Relief Act (Judicial Code, Section 274d, Title 28 U. S. C. A. Section 400). On November 15, 1944, the District Court entered its final judgment decreeing that claims 1, 2, 4 and 5 of patent No. 2,088,567 are invalid in law; that a permanent injunction issue restraining the appellant from further representing that Identification Cards forming the subject of the Patent and manufactured by the appellee are an infringement of said patent in issue; that the counterclaim be dismissed, and that the appellee have judgment for his costs. Said final judgment was entered November 15, 1944. Notice of Appeal was filed February 9, 1945, within three months of the entry of the final judgment appealed from (Section 230 of Title 28 of the United States Code).

Statement of the Case.

On August 27, 1943, the plaintiff-appellee, Ned Whitehead, doing business under the fictitious name of Whitehead & Company, filed his complaint [2-6] in the United States District Court for the Southern District Court of California, Central Division, against Otto H. Kruger and John McK. Ballou for Declaratory Judgment, alleging the defendants' assertion of ownership of and infringement by plaintiff of United States Letters Patent No. 2,088,567 granted to defendant Otto H. Kruger on August 3, 1937, for an "Identification Card," and praying for a declaration of invalidity and non-infringement of said patent. Summary Judgment [11] was entered on April 17, 1944, dis-

missing the action as to the defendant McK. Ballou on the ground that he had no right, title or interest in or to the letters patent in suit at the date of the filing of the complaint.

On April 21, 1944, the defendant Otto H. Kruger duly served and filed an answer and counterclaim [12-15] to the plaintiff's complaint. The answer admitted that the defendant had charged plaintiff's customers with infringement of the patent, and further admitted that an actual controversy existed between the plaintiff and the defendant, Kruger, but denied the remaining allegations of the complaint. The defendant's counterclaim alleged the infringement by plaintiff of the patent and prayed for an injunction restraining the plaintiff from making, selling and using identification cards embodying the patented invention, and for an accounting of profits and damages. Plaintiff's answer to the counterclaim [16-18] set up the customary defenses interposed by defendants in patent infringement suits, *i. e.*, insufficiency of disclosure, lack of invention, and anticipation.

On September 7, 1944, a trial on the complaint and counterclaim was had before the Honorable Ben Harrison, Judge of the District Court. On October 16, 1944, Judge Harrison rendered a Memorandum Opinion [20-21] to the effect that the patentee had made no discovery and no invention and that therefore the patent was invalid. Findings of fact and conclusions of law [22-24] were signed and filed, holding claims 1, 2, 4 and 5 invalid as not the result of inventive genius but requiring only the work of one skilled in the art. On November 15, 1944, final judgment [25-26] in favor of the plaintiff was entered, and defendant's counterclaim was dismissed for want of equity.

At the trial the customary order of proof was reversed at the suggestion of the plaintiff [36], so that the case of the defendant was presented first.

The subject matter of the Ballou patent [44-47] is an unalterable identification card the primary current use of which is by employees in factories and offices. It comprises a card proper such as pasteboard containing printed or other identifying matter employing a selected ink or other medium of specified character, enclosed in a transparent soluble cover. The essence of the invention is in the use and combination of a cover material and ink (or other identifying medium) having the following related properties: A solvent which will dissolve the cover, as for unauthorized access to substitute a name or photograph or signature, will cause the ink, etc., to bleed or smudge or become distorted. The solvents are no part of the invention.

Such a card which cannot be altered was not known prior to the invention here before the court.

In its memorandum opinion [20-21] the lower court stated that the gist of the patent is the discovery of a solvent; whereas, in fact the solvent is no part of the invention but is referred to as an external agent which the elements of the card shall respond to in a given way.

The lower court stated [20] that the patent does not give or furnish the means of constructing the identification card, or the compounds used therein. This comment from the memorandum opinion was repeated in finding IX [23] but does not appear as a reason for adjudging

invalidity in the conclusions of law [24]. It appears that this final rejection of the point was intentional from further statements in the memorandum opinion. There, the trial court assigned a dilemma to the defendant, resolved it by accepting what the court construed to be defendants' evidence and used such solution against the patent.

The dilemma suggested was as follows: If *any ink** would be substantially *affected* by a solvent that would dissolve the covering, there was no discovery and no patent [21]. On the other hand, if only *certain inks* would be *affected*, there was a problem stated without the solution, and therefore an invalid patent. (Presumably the court meant that the selection of inks was the problem, and that a formula for suitable inks was not recited in the patent.) However, the court resolved the constructed dilemma by accepting the proposition that all inks would be substantially *affected* by the solvent. This solution was then applied against the patent by holding that the patent represented only the skill of the art, and also that no discovery was made. Just what the lower court meant is not clear. Skill of the art suggests a contribution not rising to the dignity of invention, whereas lack of discovery as the court apparently intended depends upon prior existence of the same thing as the patent. We shall discuss these points subsequently.

The court overlooked a vital distinction. Substantially "affecting" an ink does not fulfill the requirement of the

*Emphasis throughout this brief is ours.

patent nor the language of the claims. The identifying inked matter must be *distorted*. Even if all inks are “affected” by a given solvent, only some of them will *reveal distortion by bleeding*. Such inks are well known to ink experts, as discussed later in this brief. The court misconceived the patentee’s *problem* as that of *finding* certain inks that would be dissolved or caused to bleed by the same solvent that would dissolve the transparent covering, and then concluded that all inks would be substantially “affected” by such solvents, and that therefore the problem of discovering the proper ink did not exist.

It is true there was no problem in finding a suitable ink. Simple selection from known inks was sufficient, but an ink which would bleed or distort was needed, not merely one which would merely be affected.

The real problem was the production of an alteration-proof identification card, an *article of manufacture*. The solution to that problem is contained in the patent.

The only evidence offered by the plaintiff as prior art consisted of five patents [137 *et seq.*], none of which are pertinent. None of them are mentioned in the lower court’s memorandum opinion or findings of fact. This was not an oversight, as the court remarked at the close of the trial [135]: “I want to say frankly that I am not impressed much by the prior art.”

While plaintiff denied infringement in his pleadings, the facts to establish infringement are found in his answers to interrogatories [73 *et seq.*], and his counsel stipulated that claim 1 is infringed if broadly construed [41]. Claims 1, 2, 4 and 5 are in issue [41]. Defendant did not put in any evidence on the issue of infringement. The lower court made no finding of fact or conclusion of law on the issue, resting the judgment solely on invalidity.

The Questions Presented.

1. Should the claims in issue of the patent No. 2,088,567 be adjudged invalid for want of invention or lack of a discovery when no pertinent prior art was introduced, especially in view of the lower court's misconception of what constituted the patentee's problem and how the patent solved it?

2. Should the claims in issue of the patent be adjudged invalid for insufficiency of disclosure when the testimony of the only expert witness called supported the sufficiency, and the alleged infringer was able to manufacture the patented identification card, and especially in view of the lower court's doubt as to the merit of such defense?

3. Is claim 1 of the patent to be construed so as to fall within the stipulation that it is infringed, and are claims 2, 4 and 5 infringed?

The Invention.

Referring in more detail to the patent in issue, the patented article is an alteration-proof identification card, sometimes described as forgery-proof or counterfeit-proof.

The invention comprises the *combination* of a transparent *cover*, a *card* sealed within the cover, and distinguishing *matter* (such as ink, coloring, or the like) which may be in the form of characters or writing upon the card.

This *combination* of parts is so interrelated that the material of which the *transparent cover* is made and the *distinguishing matter* on the card are subject to the action of a *common solvent*. The solvent used is no part of the invention, being wholly unauthorized in any legitimate use of the invention. A solvent, when applied to an Identifi-

cation Card of the specified character during an attempted alteration thereof, which will dissolve the transparent cover, will dissolve (bleed) ink or other distinguishing matter, and thereby *smudge, distort* or otherwise *deface* the card so as to *clearly reveal* the attempted forgery. The amount of such “distortion” or “bleeding” of the distinguishing matter by such a solvent is stated by the patent to be such an amount as is “readily distinguishable” and “clearly indicated” in the event that forgery is attempted. (Defendant’s Patent, Exhibit A, p. 2, column 1, lines 65-70; column 2, line 41 [46].)

It is especially important to note that the invention is not the “discovery” of a particular ink, a particular cover, or any other element of the combination, or of a solvent. The patent in suit is not upon a bleeding ink, *per se*, nor is it upon a material of which a transparent cover may be made, *per se*, nor, indeed, is it upon a common solvent for a bleeding ink and a transparent cover. Each of these elements is old and well known by one skilled in the art. Claim 1 reads as follows [46]:

“In an identification card, a cover that may be dissolved by a certain solvent, a card proper disposed under the cover, and distinguishing matter made to dissolve by the same solvent and associated with the card and the cover so as to disclose tampering with the card to the extent of reaching the matter by means of such solvent through distortion of the matter by the action of the contacting solvent.”

The Ballou patent was the result of thorough prosecution in the Patent Office including consideration by the Board of Appeals. That Board expressly discarded [53] the prior art Goodsell patent 1,071,226 [137] which is

appellee's principal reference in the case at bar, if indeed that patent can be thus characterized, and allowed the foregoing claim over the Goodsell and other patents.

As stated by the Board of Appeals [53], the nature of the Ballou invention is as follows:

“The invention includes the combination of a soluble cover for an identification card which carries a soluble distinguishing character, the parts being connected by an adhesive and means being provided to disclose tampering with the card by means of a solvent which would be used to remove the cover.”

The invention fulfilled the need for an alteration-proof identification card that would contain an identifying photograph, printed material, signature or other legend preserved and protected in permanent form between transparent sheets of thermoplastic. Such an identification card could not be soiled, torn, marred, or forged.

The card serves as a pass for workmen, engineers, officials and the like to admit the bearer freely within the confines of a confidential public or private enterprise, and is an aid to national security in time of war.

It is necessary that the card be unalterable so as to disclose, at a glance, to a guard at the gate or to any casual observer, any attempt to alter the card. This object the patent accomplishes, for the following reasons:

(1) The card is encased in an adhering covering of thermoplastic which must first be penetrated or dissolved away before the identification can be reached.

(2) Furthermore, the invention conceived the use of bleeding ink or coloring matter as the identifying script or picture, so that, upon any attempt to dissolve the transparent cover, which is the only practical way to reach and change the identification, the ink or color would run

so as to create an obvious blot or smudge of the same or a changed color on the face of the card. Thereby, even though the transparent cover would be wholly dissolved away, the card containing the identification would be utterly ruined for further use.

The readiness with which even a partial attempt at alteration is detectable may be noted, for example, in the illustrations of the identification cards charged to infringe [10].

If the extent of the need for forgery-proof identification cards needs to be proved, it may be seen from the fact that from the time of its appropriation by the appellee, around January, 1942, to August, 1943, the date of suit, the invention had been put into use through infringing sales by the appellee by the U. S. Army, the U. S. Navy, the U. S. Army Air Forces, the U. S. Coast Guard, and numerous war plants including the Ford Motor Co., Douglas Aircraft Corp., Lockheed Aircraft Corp., Standard Oil Co., Bethlehem Steel Co., Henry J. Kaiser, etc. [71]. (For a more complete though still partial list of appellee's customers who were users see appellee's advertisement [71].)

Such spontaneous and wide acceptance gives eloquent testimony to the genuineness of the need and the degree of inventiveness shown by a device which almost instantly usurped the field. **Nothing like it had been known prior to the invention of the patent in suit.**

Such a contribution should not be lightly brushed aside and deprived of its just reward.

Appellee Whitehead had knowledge of the Ballou patent for an indeterminate time before he filed suit, for he offered to purchase the patent for \$10,000 [78-80].

Specification of Errors Relied Upon.

(1) The District Court erred in holding in its Memorandum Opinion [21] that the problem was the finding of certain inks that would be dissolved or caused to bleed by the same solvent that would dissolve the transparent covering.

(2) The District Court erred in holding in its Memorandum Opinion [20] that the gist of the patent is the discovery of a solvent that, when it dissolves the transparent covering, usually celluloid, also destroys or mutilates the printed matter within.

(3) The District Court erred in holding in its Memorandum Opinion [21] that the witness Horowitz testified that any ink would be substantially affected by the use of a solvent, such as acetate, that would dissolve the covering.

(4) The District Court erred in holding in its Memorandum Opinion [21] that under either the patent holder's or the plaintiff's evidence the patent is clearly invalid.

(5) The District Court erred in its finding of fact number VIII [23] that the United States Letters Patent No. 2,088,567 discloses an identification card comprising a sheet of paper with certain printed markings thereon enclosed in a transparent cover, such as cellulose acetate, on which the printing on the card is done in ink that will bleed and disappear when a solvent for the cover is applied thereto.

(6) The District Court erred in its finding of fact number IX [23] that the patent in suit does not give or furnish the means of constructing such an identification card or the compounds used therein.

(7) The District Court erred in its finding of fact number X [23] that all inks would be substantially affected by the use of a solvent for the acetate cover.

(8) The District Court erred in its finding of fact number XI [23] that the patent in suit is not the result of inventive genius but at most required only the work of one skilled in the art, and no discovery was made by Ballou.

(9) The District Court erred in its finding of fact number XII [23] that all inks would be substantially affected by the solvents for the coverings.

(10) The District Court erred in its conclusion of law number II [24] that claims of patent No. 2,088,567 numbered 1, 2, 4 and 5 are invalid.

(11) The District Court erred in not adjudging that the patent in suit is valid and infringed by the identification card manufactured by plaintiff.

(12) The District Court erred in its conclusion of law number III [24] that defendant's counterclaim should be dismissed for want of equity.

(13) The District Court erred in granting an injunction to the plaintiff [24].

(14) The District Court erred in that its judgment in favor of plaintiff was contrary to the weight of the evidence.

(15) The District Court erred in failing to give judgment for the defendant because the plaintiff failed to sustain his burden of proof.

Summary of Argument.

I. Appellee had the burden of proof as to invalidity, and did not sustain it because

1. No pertinent prior art was produced.
2. No expert testimony as to insufficiency of disclosure was offered.
3. The lower court's observation that the patentee made no discovery is erroneous.

II. The patent is fortified by

1. Presumption of validity.
2. Board of Appeals decision.
3. Utilization of the invention by appellee and numerous customers.
4. Testimony of expert supporting sufficiency of disclosure.

III. The patent should be broadly construed because there is no limiting prior art.

IV. Infringement is established by appellee's answers to interrogatories, including his own advertisements, and by stipulation of appellee's counsel.

ARGUMENT.

I.

Appellee Had the Burden of Proof as to Invalidity, and Did Not Sustain It.

It is settled law that the burden of proof is on the party alleging invalidity to prove it beyond a reasonable doubt (*Schumacher v. Buttonlath Mfg. Co.*, 292 Fed. 522, 530 (C. C. A. 9); *Walker on Patents* (Deller's Ed.), Vol. 2, p. 1273), regardless of the reversal of the normal order of proof. (*Wigmorc on Evidencce*, Vol. 9, p. 285.) Moreover, appellee having taken the initiative as plaintiff, thereby increased such burden.

The certified copy of the Letters Patent No. 2,088,567 introduced in evidence [42] established a *prima facie* case in favor of the appellant in both the main action (declaratory relief) and the counterclaim. (*Mumm v. Decker*, 301 U. S. 168, 171.)

1. No Pertinent Prior Art Was Produced.

Appellee pleaded seventeen patents as prior art [5] and offered five of them in evidence [112 *et seq.*]. Appellant sought to offer testimony to distinguish them [128] but met with an objection from appellee's counsel and discouragement by the court. The lower court was "not impressed much by the prior art" [135].

The closest prior patent is Goodsell No. 1,071,226 [138], for a plant label. It was before the Board of Appeals; and in the word of appellee's own counsel "It does not refer to the character of ink at all" [129]. It does not in any sense meet or suggest the terms of Ballou's claims.

2. No Expert Testimony as to Insufficiency of Disclosure Was Offered.

The only competent evidence upon the sufficiency of a disclosure is that of one skilled in the art, *i. e.*, an expert. Walker on Patents (Deller's Ed.), Vol. III, page 2035, states:

"The twelfth defense (insufficiency of disclosure, *ibid.*, page 1976) can be supported by *no* evidence *except* that of persons skilled in the art to which the invention pertains, or with which it is most nearly connected."

Walker cites *Anraku v. General Electric Co.*, 80 F. (2d) 958, 963, C. C. A. 9, 1936, certiorari denied 298 U. S. 678, 80 L. Ed. 1399. In that case this court said:

"A description of the patent under the statute is sufficient if it will 'enable any person skilled in the art * * * to make * * * and use the same.' To determine, therefore, whether or not a description is sufficient, we must ask the people who are in fact skilled in the art, for a court will not presume to be skilled in every art which may be involved in controversies."

And again:

"With regard to the usual contentions made by those claiming insufficiency of description, it was aptly stated in *General Electric Co. v. R. P. Mallory & Co.*, *supra*, 298 Fed. 579, page 588: 'Patents often lend themselves to finespun theories; but it is singular how plain they are if they are worth anything to the man who wishes to infringe for profit.'"

Also see *Schumaker v. Buttonlath Mfg. Co.*, *supra*, 292 Fed. 522, C. C. A. 9 (relied upon in *Anraku v. General*

Electric Co., supra), which is in many respects close to the present case on its facts. On page 533 this court said:

“We find no evidence in the record even tending to show that the disclosures were not sufficient to enable any person skilled in the art to make, construct, compound and use the same Certain it is the disclosure was sufficient to enable the defendant to procure in the paper market the required quality of paper and follow plaintiffs’ process in other respects.”

The sole oral evidence introduced by the appellee is the testimony of Ned Whitehead [116] of whom the court said at the conclusion of the trial [135]:

“* * * you have the testimony of the expert for the defendant and the testimony of the plaintiff in the case, *who is not an expert*, because he said he was a salesman until he started in his own business in 1942. Up to that time he was in the sales end of the game. After that he started out on his own, making these machines for the purpose of manufacturing these identification cards.”

Whitehead’s whole testimony [116] related to his inability *as an acknowledged layman* to procure an ink that would bleed under all solvents for his cellulose acetate cover.

Whitehead’s testimony is divisible into two parts:

a. His statements that no ink manufacturer contacted by him had been able to furnish him with an ink that would bleed under all solvents.

b. His testimony of experiments he had allegedly conducted showing (at most) that some nine inks allegedly submitted to him would bleed under the action of certain

solvents, though they would allegedly not bleed under the action of certain other specified solvents. The results of these alleged experiments are set forth in evidence as Plaintiff's Exhibits 9-A to 9-H, inclusive.

Neither part of Whitehead's evidence is sufficient to warrant an inference that no suitable ink existed. The evidence of Whitehead's alleged experiments was to bolster the feeble evidence of his alleged inability to find a suitable ink.

Taking Whitehead's testimony in the light most favorable to him, it can only be spelled to say that he as a layman did not find a suitable ink. At the close of his direct examination he said [119-120]:

(Question by Mr. Frederick W. Lyon): "Summing up your testimony, Mr. Whitehead, it is that you have been manufacturing identification cards for some time?"

(The Court): "For how long?"

(Answer by Ned Whitehead): "*Since January 1, 1942.*"

(Question, the Court): "What was your business prior to that time?"

(Answer): "Manager Jeffries Banknote Company, as a salesman, and 10 years before that I was with an art company."

(Question by Mr. Frederick W. Lyon): "During *all that time* have you made continuous requests for ink that will bleed in these solvents, from the *various companies?*"

(Answer): "Yes."

(Question by Mr. Lyon): "*And no company has ever been able to send you ink that would bleed in even half of the known solvents?*"

(Answer): "No."

(Question): "That is all."

Yet upon cross-examination the “various companies” narrow down to one company [121]:

Question by Mr. Franklin: “You said that you went to certain companies to get these inks that bleed under certain solvents. Will you name those companies?”

Answer of Ned Whitehead: “I said I went to a company. That was Fuch-Lang, in New York. They are a division of the General Printing Corporation.”

Question: “That was *one* company you went to?”

Answer: “Yes.”

Question: “They couldn’t make the ink, you say?”

Answer: “That would bleed in all solvents, no.”

Solely by the above evidence and a few exhibits constituting the evidence of alleged experiments made *ex parte*, the appellee sought to prove that appellant’s patent was invalid as containing an insufficient disclosure. Such evidence is manifestly inconclusive and indirect. It is not the testimony of an expert, though it purports to establish what only an expert may testify to—to wit: the sufficiency of a disclosure.

In *Carson v. American Smelting & Refining Co.*, 4 F. (2d) 463 (1925), C. C. A. 9, rehearing denied, it was held, at pages 465-466, that evidence of “experiments” thus conducted by an interested party, and in the absence of his adversary, is always received with suspicion, and is more or less discredited.

Moreover, Whitehead’s answer [73] to defendant’s first interrogatory [68] contradicts his oral testimony that he could obtain no suitable ink.

It is likewise significant that Whitehead's advertisements constituting representations to the Nation's war plants, Exhibit A [71] affixed to defendant's Interrogatories, states:

"Save valuable time and safe-guard your plant with Whitehead counterfeit-proof identification Cards and Badges made with combination shadow and wire type, multi-colored planchettes, water marked paper and engraved with specially prepared inks which bleed and change color when exposed to chemicals that dissolve thermoplastic."

See also the advertisement, Exhibit B, affixed to the same Interrogatories [72], in which it is stated:

"These [the identification cards] are engraved with specially prepared inks which bleed, and change color when exposed to the chemicals that dissolve thermoplastic, thereby preventing alterations."

The only basis for appellee's attack upon the patent regarding disclosure was the absence of an ink formula. However, he understood the disclosure well enough to get into business manufacturing identification cards which his own counsel stipulated infringed claim 1 of the patent if broadly construed [40-41].

In contrast to Whitehead, appellant's expert Horowitz, the only expert at the trial, testified [92] that he had made the identification cards of the character desired, that samples of the ink made had been submitted to the Whitehead Co. [92], and that the selection of suitable materials, including inks, would be *"the most simple kind of a task"* [94].

3. The Lower Court's Observation in Its Memorandum Opinion That the Patentee Made No Discovery Is Erroneous.

Such comment [21] is not based on anything revealed in the prior patents in evidence, but on the court's interpretation of the testimony of appellant's expert witness Horowitz to the effect that any ink would be substantially *affected* by the use of a solvent such as acetate that would dissolve the covering (memorandum opinion [21] and finding X [23]). It is to be inferred that the reasoning back of the court's mental result is that all printed identification cards sealed in a soluble cover ever before made fulfilled the terms of the Ballou patent, and that since they previously existed Ballou could not make a discovery. Such reasoning is nowhere stated, but in an effort to clarify the point we are supplying it.

Now, if an identification card having the characteristics of the patented card ever previously existed, no one was aware of it. Why were such cards not in use? The Goodsell patent reference was issued in 1913, previous to World War I.

Lack of discovery was a defense not advanced by the appellee who initiated the litigation and attack upon the patent by his complaint for declaratory relief. It was injected by the trial court on the erroneous premise that *affecting* an ink is synonymous with causing an ink to *bleed or become distorted*.

Regardless of whether or not all inks are affected by a solvent, all inks will not bleed or become distorted by a solvent. Therein lies the crux of the patent.

The Patent does not depend upon merely “affecting” an ink, but upon its bleeding, blotting or running, or, as stated in claim 1, for example [47]:

“. . . so as to disclose tampering . . . through *distortion* of the matter by the action of the contacting solvent.”

“Distort,” according to Webster’s International Dictionary, means:

“1. To twist out of natural or regular shape; to twist aside physically; as, to *distort* the limbs, or the body. . . .

2. To force or put out of true posture or direction. . . .

Syn.—Twist, wrest, deform.”

But “affect,” according to the Standard Abridged version of the same authority, means:

“1. To lay hold of or attack (as a disease does); to act or produce an effect upon; to impress or influence . . . to touch.”

Ballou, the patentee, fully clarified his intention in the descriptive section of his specification [46], column 1, lines 63-73:

“From the above it must be understood that the main principle involved is to provide an *easily distinguishable* appearance with distinct and clear-cut outlines when and while in undisturbed form and condition, which, however, will result in just as *readily distinguishable appearance of an unclear blurred outline, or distorted*, when tampered with, the whole identification with distinguishing controlling matter being encased whereby a forging is made practically impossible.”

Finding X [23], "That all inks would be substantially affected by the use of a solvent for the acetate cover," is therefore irrelevant. Its statement epitomizes the error into which the case has fallen. As the sole expert witness at the trial testified in his fruitless attempts to clarify the erroneous impression of the court [104-105]:

Question on cross-examination (by Mr. Frederick W. Lyon): "But *any* ink that was used up to today would bleed or run?"

Answer (testimony of David Horowitz): "*Not necessarily*. I want to get this clear. I made a statement before, and I want to clarify the thing if I may. You can absorb into the surface of the paper a sufficient degree of pigment so that the pigment remains after the vehicle has been washed out. Nonetheless, when ink is entirely broken down, it loses its value as a pigment media because then, in subsequent handling, you have nothing to hold that pigment. We have never succeeded in making an ink that would **resist** the action of a cellulose solvent. That was what I meant. **The question of the bleeding of color is an entirely different proposition.** Then we can use a **select** pigment that will commonly **bleed** under the action of almost any solvent."

* * * * *

Question: "It is true, isn't it, that *any* ink manufactured will be defaced, so that tampering with it would seem [be seen], when acetone or ketone are applied to it?"

Answer: "No. * * *"

II.

The Patent in Issue Is Fortified by:

1. Presumption of Validity.

In *Park-In-Theatres v. Rogers*, 130 F. (2d) 745, 747, C. C. A. 9, 1942, this court held:

“The issuance of a patent is presumptive evidence of invention and patentability. The presumption is so strong that in the event of a reasonable doubt as to patentability or invention, that doubt must be resolved in favor of validity of the patent.”

Citing *Mumm v. Decker*, 301 U. S. 168, 171.

The rule is established by a long list of cases:

Wilson & Willard Mfg. Co. v. Bole, 227 Fed. 607, 609, C. C. A. 9, 1915;

Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522, 523, C. C. A. 9, 1920;

Chester N. Weaver, Inc., v. American Chain Co., 9 F. (2d) 372, 380, C. C. A. 9, 1925;

Bankers' Utilities Co. v. Pacific National Bank, 18 F. (2d) 16, 18, C. C. A. 9, 1927;

Stoody v. Mills Alloys, 67 F. (2d) 807, 809, C. C. A. 9, 1933;

Reinharts Inc. v. Caterpillar Tractor Co., 85 F. (2d) 628, 630, C. C. A. 9, 1936.

Moreover, where prior art patents are considered by the Patent Office, which thereupon upholds the patent, the presumption of validity over the prior art cited is strengthened.

J. A. Mohr & Son v. Alliance Securities Co., 14 F. (2d) 799, 800, C. C. A. 9, in which this court held:

“And the presumption that a patented combination is new and useful and embodies invention has added force where, as here, it appears that the patents relied upon as showing anticipation were considered by expert patent office officials.”

2. Board of Appeals Decision.

The issuance of the Ballou patent after an appeal to the Board of Appeals of the Patent Office strengthens the presumption of validity and invention.

Celanese Corp. of America v. Essley Shirt Co., 98 F. (2d) 895, 896, C. C. A. 2 (citing *J. A. Mohr & Son v. Alliance Securities Co.*, *supra*);

Trane Co. v. Nash Engineering Co., 25 F. (2d) 267, 268, C. C. A. 1;

Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 989, C. C. A. 8.

3. Utilization of the Invention by Appellee and Numerous Customers.

Wide commercial adoption of the patented article was evidence of invention.

Payne Furnace & Supply Co. v. Williams-Wallace Co., 117 F. (2d) 823, 826, C. C. A. 9, 1941, cert. denied 61 S. Ct. 958, rehearing denied 61 S. Ct. 1095;

The advertisements of Appellee Whitehead & Company not only clearly indicate the manufacture of an identification card made in accordance with the specification and

claims of the patent in suit, but also assert the adoption of the infringing card by the following companies, Exhibit A of Interrogatories [71]:

“A few users of Whitehead products and equipment:

Anaconda Copper Mining Co.
Basic Magnesium Corp.
Bendix Aviation Corp.
Bethlehem Steel Corp. (Fairfield Shipyard Div.)
Black and Decker
Calif. Shipbuilding Corp.
Caterpillar Tractor Co.
Century Electric Co.
Chicago Flexible Shaft Co.
Consolidated Aircraft Corp.
Douglas Aircraft Corp.
Firestone Rubber Co.
Ford Motor Company
Goodyear Aircraft Corp.
Grumman Aircraft Eng. Corp.
Kaiser Company (Henry J. Kaiser)
Lockheed Aircraft Corp.
Glenn L. Martin Co.
Mack Manufacturing Co.
National Cash Register Co.
Oregon Shipbuilding Co.
Pratt & Whitney Aircraft Corp.
Standard Oil Co.
Timken Roller Bearing Co.
Underwood Elliot Fisher Co.
United Aircraft Corp.
U. S. Army
U. S. Army Air Forces
U. S. Coast Guard
U. S. Navy”

4. Testimony of Expert Supporting Sufficiency of the Patent Disclosure.

It was established by the testimony of appellant's expert, Horowitz [104 *et seq.*], that there are at least two general types of inks:

1. Bleeding or soluble inks, and
2. Non-bleeding, insoluble inks, or stable inks, and that all inks are made up of a *pigment* and a *carrier* for the pigment. Horowitz' testimony further shows that the color is in the pigment, so that in a stable ink a solvent may wash away the carrier in a manner to leave the pigment in place, *i. e.*, merely "affected" or "touched" "as by disease." Such an ink would be *permanent* or *stable* in the sense that the pigment would not run or bleed but would merely remain *in situ*, bonded into the fibre of the card.

On the other hand, there are pigments which are "fugitive" and "bleed" or "run" under the influence of any given solvent or class of solvents. Thus, there are pigments which run when subjected to any solvent for cellulose acetate, just as there are pigments (found in ordinary "washable" inks) which run or bleed in water. And there are inks of the well-known "permanent" or "India" variety which will not run or bleed in water but will, for example, dissolve in acid, or alkali or any one or another of the legion of solvents.

Horowitz holds a Doctor of Science degree, and is an ink manufacturer with extensive experience [92].

The selection of the correct ink, or the making of a correct ink to fulfill the requirement of the patent is explained by Horowitz [92 *et seq.*]. As an ink expert he had no difficulty in supplying what was needed [94]. It was "the most simple kind of a task" [94].

The lower court commented [134]:

“It does appear that, in view of the testimony of the expert for the defendant, who appears to be a very well informed man, that a person skilled in the art on reading this patent would not have any too great difficulty in following it out.”

In view of such conclusion by the lower court, and the court's acceptance by its memorandum opinion of appellee's contention that one skilled in the art could follow the teachings of the patent without difficulty [21], the court's finding number IX [23], “That the patent in suit does not give or furnish the means of constructing such an identification card or the compounds used therein,” is manifestly inadvertent and is directly contrary to the evidence. That it was not intended is apparent by the omission in the conclusions of law to hold the patent invalid on such ground.

Even conceding for the purpose of argument that experimentation is proved necessary (*which fact appellee has not established*), the language of this court in *Schumacher v. Buttonlath Mfg. Co.*, *supra*, 292 Fed. Rep. 534, seems appropriate, wherein it is stated:

“Defendant contends further that the specification and claims do not make a sufficient disclosure of the process to enable anyone skilled in the art or science to which the process relates to practice the same and produce the results described in the patent without resorting to experiments, trials, or tests. R. S., Sec. 4888 (U. S. Comp. Stat., Sec. 9432.)

* * * * *

“It is contended that no one can tell, except by independent experiment, how to conduct the claimed processes so as to have them successfully co-ordinate

and co-operate together, to produce the useful result required by the statute. This scope of experimental requirement, it is contended by the defendants, is beyond the disclosures of the specification and claims, and render such disclosures insufficient.

“This objection has been brought to the attention of the appellate courts of the United States in a number of cases, particularly in *Mowry v. Whitney*, 14 Wall. 620, 643, 20 L. Ed. 860;

Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 436, 437, 22 Sup. Ct. 698, 46 L. Ed. 968;

Minerals Separation v. Hyde, 242 U. S. 261, 270, 37 Sup. Ct. 82, 61 L. Ed. 286;

Minerals Separation v. Butte Min. Co., 250 U. S. 336, 341, 39 Sup. Ct. 496, 63 L. Ed. 1019; and

Snow et al. v. Kellar-Thomason Co. in this Court, 241 Fed. 119, 120, 154 C. C. A. 119.

“These cases involve processes in which something had been left by the specification and claims to the skill of persons applying the processes. In the last two Supreme Court cases, the process related to the concentration of ores by process of oil flotation. By reason of the varied character of the ores to be treated, preliminary tests were required by the user to determine the amount of oil and the extent of agitation necessary in order to obtain the best results from the different ores. Speaking of this feature of the process and the alleged uncertainty of the specification and claims as to the amount of oil to be used in the application of the invention, the court said:

‘Untenable is the claim that the patent is invalid for the reason that the evidence shows that when different ores are treated preliminary tests must be made to determine the amount of oil and the extent of agitation necessary in order to obtain the best results. Such variation of treatment must be within the scope of the claims, and the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter. The composition of ores varies infinitely, each one presenting its special problem, and it is obviously impossible to specify in a patent the precise treatment which would be most successful and economical in each case. The process is one for dealing with a large class of substances, and the range of treatment within the terms of the claims, while leaving something to the skill of persons applying the invention, is clearly sufficiently definite to guide those skilled in the art to its successful application, as the evidence abundantly shows. This satisfies the law.’ ”

No case has been found where a patent was overthrown because any infringing *layman* claimed not to have been able to practice its teachings.

Appellee did not call an expert on the subject and the presumption arises that if he had the testimony would have been against him.

Hann v. Venetian Blind Corp., 21 F. (2d) 913, affirmed 111 F. (2d) 455, 458, C. C. A. 9, 1940.

III.

**The Patent Should Be Broadly Construed Because
There Is No Limiting Prior Art.**

It is axiomatic that the prior state of the art to which an invention belongs must be considered in construing any claim for that invention.

Walker on Patents, Deller's Ed., Vol. II, p. 1238,
and cases there cited.

One who first invents an unique feature is entitled to a liberal construction of what he first brought into the art.

Shakespeare v. Perrine Mfg. Co., 91 F. (2d) 199,
C. C. A. 8, 1937.

IV.

**Infringement Is Established by Appellee's Answers
to Interrogatories, Including His Own Advertisements,
and by Stipulation of Appellee's Counsel.**

See appellant's interrogatory No. 1 [68]:

"State the elements used and the method of manufacture of the plaintiff's identification card and its envelope, as set forth in Paragraph V of the complaint."

The answer [73]:

"The elements used are two sheets of thermoplastic called cellulose acetate, a piece of paper having printed data thereon; the ink with which the data is printed bleeds and changes color when a solvent for the plastic is applied. The method of manufacture is to

place the piece of paper between the two sheets and place the same in a hydraulic hot platen laminating press.”

Also see Exhibits A [71] and B [72] attached to the interrogatories, comprising advertising literature of appellee Whitehead & Co.:

Quoting from Exhibit A:

“Save valuable time and safeguard your plant with Whitehead counterfeit-proof Identification Cards & Badges made with combination shadow and wire type, multi-colored planchettes, water marked paper and engraved with specially prepared inks which bleed and change color when exposed to chemicals that dissolve thermoplastic.”

And from Exhibit B:

“These [identification cards] are engraved with specially prepared inks which bleed, and change color when exposed to the chemicals that dissolve thermoplastic, thereby preventing alterations.”

Claims 1, 2, 4 and 5 of the Ballou patent read directly on such identification cards.

Appellee has through his counsel expressly admitted infringement of claim 1 [40-41], and has not pointed out anything to distinguish his card from claims 2, 4 and 5.

The lower court made no finding as to infringement, and the whole context of the record supports the conclusion that infringement is obvious.

Conclusion.

For these reasons, the judgment of the lower court should be reversed, the patent held valid and infringed, an accounting of profits and damages be ordered, and an injunction issue against further infringement.

Respectfully submitted,

HERBERT A. HUEBNER,

Attorney for Appellant.

Los Angeles, California, August 8, 1945.

No. 11008.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious name
of Whitehead & Co.,

Appellee.

APPELLEE'S BRIEF.

LYON & LYON,
FREDERICK S. LYON,
FREDERICK W. LYON,

811 West Seventh Street, Los Angeles 14,
Attorneys for Appellee.

FILED

SEP 12 1945

TABLE OF CONTENTS.

	PAGE
Jurisdiction	2
Statement of the Case.....	2
The Ballou Patent.....	2
Goodsell-Maynard Patent 1,071,226, Plaintiff's Ex. 3.....	4
No Ink Known Which Is Not Defaced by Solvent.....	5
The Walsh-Caprio Patent 2,079,641.....	7
Grounds of the District Court's Decision.....	11
The Questions Involved.....	12
Summary of Judgment.....	13
The District Court Was Correct in Concluding That the Ballou Patent Did Not Disclose Patentable Invention.....	13
The Ballou Patent Is Invalid as Not Complying With the Requirements of the Patent Statute R.S.U.S. 4888, 35 U.S. C.A. Sec. 33.....	13
Was the District Court in Error in Concluding That the Pro- duction of the So-called "Identification Card" Defined in Claims 1, 2, 4 and 5 of the Ballou Patent Did Not Require Patentable Invention	14
Does the Written Description and the Disclosure of the Ballou Patent Comply With the Requirements of the Patent Statute R.S.U.S. 4888, 35 U.S.C.A., Sec. 33? If Not the Patent Is Void	27
Conclusion	29

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Abbott Machine Co. v. Universal Winding Co., 137 F. 2d 166....	21
Alexander Milburn Co. v. Davis-Bournoville Co., 270 U.S. 390	8
Altoona Publix Theatres, Inc. v. American Tri-Ergon, 294 U.S.	
477, 79 L. ed. 1005.....	14
Aron v. Manhattan Ry. Co., 132 U.S. 84.....	23
Bingham Pump Co. v. Edwards, 118 F. 2d 338, C.C.A. 9.....	17
Brill v. St. Louis Car Co., 96 F. 666, C.C.A. 8.....	4
Columbia Motor Car Co. v. C. A. Duerr Co., 184 F. 893,	
C.C.A. 2	28
Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S.	
405, 52 L. ed. 1122.....	14
Corn Products Ref. Co. v. Penick & Ford, 63 F. 2d 26.....	14
De St. Germain v. Brunswick, 135 U.S. 227.....	16
Detroit-Stoker Co. v. Brownell Co., 89 F. 2d 422, C.C.A. 6.....	24
Dyer v. Sound Studios of New York, Inc., 85 F. 2d 431,	
C.C.A. 3	18
Farmers Co-op Exchange v. Turnbow, 111 F. 2d 728, C.C.A. 9	
.....	18, 29
General Electric Co. v. Wabash Appliance Corp., 304 U.S. 364..	29
Grand Rapids Show Case Co. v. Weber Show Case & Fix. Co.,	
38 F. 2d 730, C.C.A. 9.....	17
Greenwalt v. Stanley Co., 54 F. 2d 195, C.C.A. 3.....	18
Guthrie v. Curlett, 10 F. 2d 725, C.C.A. 2.....	16
Henry v. City of Los Angeles, 255 F. 769, C.C.A. 9.....	14
Hubbell v. United States, 179 U.S. 75.....	4
I.T.S. Rubber Co. v. Essex Rubber Co., 272 U.S. 429.....	4
Kalich v. Paterson Pacific Parchment Co., 137 F. 2d 649.....	19
Kellogg Switchboard & Supply Co. v. Michigan Bell Telephone	
Co., 99 F. 2d 207.....	24

	PAGE
Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. 2d 263, C.C.A. 8.....	18
Mettler v. Peabody, 77 F. 2d 56, C.C.A. 9.....	8
New York Belting & P. Co., et al. v. Sierer, et al., 149 F. 756....	25
Page Steel & Wire Co. v. Smith Bros. Hardware Co., 64 F. 2d 512, C.C.A. 6.....	24
Permutit Co. v. Graver Corp., 284 U.S. 52.....	28
Rip Van Winkle W. B. Co. v. Murphy W. B. Co., 1 F. 2d 673, C.C.A. 9	14
Sinclair & Carroll Co. v. Interchemical Corp., Supreme Court May 21, 1945.....	19
Union Paper Collar Co. v. Van Deusen, 90 U.S. 530, 23 L. ed. 128	3
Voightmann et al. v. Perkinson, et al., 138 F. 56.....	23

STATUTES.

Declaratory Relief Act, Judicial Code, Sec. 74(d), 28 U.S.C.A. 400	2
---	---

TEXTBOOKS.

Walker on Patents, Deller Ed., Vol. 1, 179.....	20
---	----

No. 11008.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious name
of Whitehead & Co.,

Appellee.

APPELLEE'S BRIEF.

This case comes before this Court upon an appeal from the final judgment of the United States District Court for the Southern District of California adjudging the Ballou Patent No. 2,088,567, and particularly Claims 1, 2, 4 and 5 thereof, invalid, and enjoining Appellant "from further representing to the trade, and particularly to Plaintiff's customers, that identification cards manufactured by Plaintiff are an infringement of, or that any use of said trade or customers is an infringement" of said patent [R. 25].

Appellee filed an action in the District Court alleging that an actual controversy existed between Appellant and Appellee respecting the validity of said patent and the alleged infringement thereof by Appellee, and asked a judgment against Appellant that the patent was invalid and that Appellee had not infringed it [Complaint R. 3,

6]. Appellant answered admitting Plaintiff's assertion that such actual controversy existed between Appellant and Appellee [Answer R. 13], and counter-claimed against Appellee asserting the validity and infringement by Appellant [R. 15], praying a final injunction against further infringement by Appellee, etc. [R. 15]. Appellee in his answer to such counter-claim pleaded the invalidity of the patent [R. 16-18].

Jurisdiction.

Jurisdiction of the District Court and of this Court to hear this appeal is clear. The appeal was timely. *The Declaratory Relief Act, Judicial Code, Sec. 274(d), 28 U.S.C.A. 400*, establishes jurisdiction of Appellee's declaratory judgment action, and the District Court had exclusive jurisdiction to determine the issues of validity and infringement of the patent, which arose under the patent laws of the United States (Judicial Code, Sec. 41).

Statement of the Case.

The Ballou Patent:

The Ballou patent describes and claims a composite card. The purpose of this card is to serve as a means of identification. Such identification may be of a person or other object. Nothing in the patent claims limits the card to any novel thing which identifies a human being from any other animal or thing. To prevent alteration the identification card proper is enclosed within and united with a transparent cover. Such cover is composed of a material that can be removed by a solvent. The print-

ing on the card is in ink or in coloring matter that will be destroyed or defaced by the action of the solvent in removing the cover. [Ballou Patent, R. 45, p. 1, col. 1, ll. 45-55].

It is admitted that the cover commercially used on Appellant's and Appellee's cards is cellulose acetate [R. 88, Answer to Dfts. Interr. No. 1; R. 73-74].

The subject matter of this patent is an article of "manufacture", as distinguished from "an article", "machine", or "composition of matter" (R.S.U.S. 4886; 35 U.S.C.A. Sec. 31), and "nothing short of invention or discovery will support a patent for a manufacture any more than for an article, machine or composition of matter, for which proposition there is abundant authority in the decisions of this court." (*Union Paper Collar Co. v. Van Deusen*, 90 U.S. 530, 23 L. ed. 128, at 133.)

The patent describes the so-called "identification card" as consisting of a transparent cover within which a card is enclosed, this card being imprinted with, or otherwise carrying, what is termed in the patent "distinguishing matter." The patent does not disclose any novel kind of card, either with respect to material, shape or construction, nor any novel distinguishing matter serving identification purposes. The sole claim of invention is the imprinting of the distinguishing matter (of whatever character) upon the enclosed card in an ink or coloring matter which dissolves when the dissolving solvent of the transparent cover is applied thereto. [Cf. Ballou Patent, R. 45, p. 1, col. 1, ll. 47-55.]

"* * * the point is that the identification matter will always be made of a medium dissolvable by the same solvent by which the cover can be dissolved,

so that no identification matter will be left on any attempt of dissolving the cover for the sake of obtaining the identification for misrepresentation or alteration." [Id., col. 2, ll. 4 to 10.]

Ballou and Appellant admitted that there was nothing novel in this identification card except the imprinting or forming of the so-called distinguishing matter of an ink or coloring which would dissolve by the same solvent that would dissolve the cover, and Appellant is estopped to contend otherwise. [Cf. rejected and cancelled Application Claim 6, R. 52; testimony of appellant, R. 63.]

The card defined by Claims 1, 2, 4 and 5 of the Ballou patent differs from this admittedly old card of cancelled Application Claim 6 *solely* in printing or forming of the so-called "distinguishing matter" of a material "made to dissolve by the same solvent" that will dissolve the cover. (*I. T. S. Rubber Co. v. Essex Rubber Co.*, 272 U.S. 429, at 443, 444; *Hubbell v. United States*, 179 U.S. 75; *Brill v. St. Louis Car Co.*, 90 Fed. 666, C.C.A. 8.)

The Goodsell-Maynard Patent
1,071,226 [Plaintiff's Exhibit 3,
R. 138-140].

This patent discloses an identification card enclosed in a celluloid cover. This cover is attached to the card in the same manner as the cover in the Ballou patent [Cf. R. 140, Goodsell-Maynard Patent, p. 2, ll. 5 to 45; Id. 139, ll. 20-26].

The Goodsell-Maynard Patent does not disclose what kind of ink or coloring matter is or may be used for printing upon the card or identifying device 4.

**No Ink Known Which Is Not
Defaced by Solvent.**

In deciding this case the District Judge accepted the testimony of Appellant's expert Horwitz, who testified that manufacture of an ink that would *not* bleed has been and still is a problem [R. 105].

"Q. Then there is no ink which could be applied, even today, to cards in these cellulose acetate covers, under heat and pressure, which, upon dissolving the cellulose acetate covers, could be re-coated, without destruction of the printed matter. A. Not without so defacing it that it would be easily recognizable as having been tampered with." [R. 106.]

* * * * *

"The Court: In other words, it has been generally known that there was a solvent that would cut printed matter? A. That is right.

The Court: It is also well known, isn't it, that there is a solvent that will dissolve celluloid material. A. Yes. That also goes back many, many years.

The Court: To a man skilled in the profession there is nothing about the ink combinations here that is unusual? A. No. It hasn't been unusual for the past 20 years anyway, maybe longer than that. My recollection goes back to the years I was working in the press room, when they were making identification tabs. At the old John C. Moore Corporation in New York City, we were playing around in those days with the fusing together of two parts of celluloid, having a gummed flag of fabric attached to it. That goes back to 1910 and 1911.

The Court. Has there ever been a time when you have before been confronted with the problem of working out an identification card? A. No, sir.

The Court: Is that the first time? A. This is the first time, to my knowledge, and, if I may elaborate on that a little bit, I have covered the graphic arts field for 40 years now, and *there has never been a time or an industry other than the one created by the present emergency that made that kind of thing necessary and essential. In this war they have found this kind of thing completely essential and necessary in the creation of small industries, this identification proposition.*" [R. 102, 103; emphasis supplied.]

* * * * *

"No printing ink has yet been made that will withstand the action of acetate solvent. All vehicles that are used in printing ink will break down under the action of any acetate solvent." [R. 95.]

* * * * *

"The Court: I understand from your testimony that, generally speaking, any celluloid material that can be dissolved or that is susceptible of dissolving, the solvent would also affect the ink? A. The same solvent would affect the ink, yes, and I think the word 'affect' is used advisedly there, because it would affect it in varying degrees. In some instances it will take it out completely, and in others it will take it out in more modified ways and in other cases it would destroy the fabric of that ink. The ink is no longer the same after it has been hit by that solvent.

The Court: I think that is all.

Redirect Examination.

Q. By Mr. Franklin: You say that different solvents affect the ink to different degrees. That being the case, would you say that all solvents that would dissolve cellulose acetate would be sufficient to

dissolve the ink in such a way that it would show up on the card to show that it had been tampered with? A. I would say that any solvent that will take that cellulose acetate off would affect the printed matter there to a degree that it would show tampering.” [R. 110.]

The problem in ink manufacture was not to produce an ink which would not bleed or run or be defaced in a cellulose solvent. The difficulty with the earlier inks was this bleeding and dissolving. Appellant’s expert, Horwitz, made this clear:

“Q. Is it not true that for 20 odd years or much longer that ink problems have had to do with producing a fixed ink? A. Will you explain what you mean by a ‘fixed ink?’

Q. An ink that would not dissolve, bleed or leach in alcohol esters? A. It is still a problem.

Q. You haven’t succeeded ever in manufacturing a fixed ink? A. Not for the printing and lithographic arts, industries, no.” [R. 104.]

The Walsh-Caprio Patent
2,079,641 [R. 154-6].

This patent discloses a process of making an integral structure or manufacture comprising “a plurality of sheets at least one of which is of cellulose acetate plastic, and at least one of which bears bleeding colors, said sheets joined by means of a sheet of cellulose acetate plastic containing at least 60 parts plasticizer to 100 of cellulose acetate base between each pair of said first mentioned sheets.” [Claim 4, R. 156.]

The product produced by the Walsh-Caprio process results in the production of an article of manufacture substantially identical with the article defined by the Ballou patent claims. The application for this patent was filed January 11, 1930, almost four years prior to the filing, on October 22, 1934, of the application for the Ballou patent. [Cf. certified copy Walsh-Caprio application, Pltfs. Ex. 8.] All that was set forth in such application was made a part of the prior knowledge by the filing of such application and is thereby proven to have been known prior to Ballou's alleged invention. (*Alexander Milburn Co. v. Davis-Bournonville Co.*, 270 U.S. 390.) This patent was not considered by the Patent Office in the negotiations for the grant of the Ballou patent and the usual presumption of validity of the Ballou patent is thereby overcome and the court called upon to determine the issue of invention as a matter of first impression. (*Mettler v. Peabody*, 77 F. 2d, 56, 58, C.C.A. 9.)

The Walsh-Caprio patent states that: "An object of our invention, therefore, is to provide a cement which will not cause blushing, bubbles or pockets and will not cause colors to run or bleed." [R. 155, Col. 1, ll. 19-22.]

The drawings show a print or card 1 "having a paper base" and "having an outer color surface." [R. 155, col. 1, ll. 44-47.]

"It is assumed for the purposes of illustration that the color or colors of the print 1 have a tendency to run or bleed when the ordinary volatile liquid

solvents or cements are used. To overcome this tendency of the colors to run or bleed, we use between sheet 4 and print 1, a cement 5 in sheet form comprising substantially non-volatile solvents for the cellulosic plastic, preferably combined with at least a small proportion of the particular cellulosic plastic. The presence of at least a small proportion of the cellulosic plastic is particularly preferred where the non-volatile solvents are of an oily nature, in order that the cement may be maintained in sheet or other solid form. The use of a proportion of the cellulosic plastic also aids in producing a final product which is substantially homogeneous throughout, except for the print or its equivalent." [R. 155, col. 1, *l.* 54, to col. 2, *l.* 12.]

The patent contains complete formulae setting forth in detail the composition of the so-called thermoplastic cements. Formulae A and C refer to cellulose acetate and Formulae B and D refer to cellulose nitrate as the main ingredients, and the other chemicals in the formulae as plasticizers or thinners. "Cellulose acetate" and "cellulose nitrate" as well as celluloid are well known clear, plastic substances, all usable for covering the surface of an identification card. They have no visible physical differences. Either of these correspond with exactitude to celluloid or the "different transparent materials" which may be used instead of celluloid as set forth as equivalents in the Ballou patent. Plaintiff uses cellulose acetate in covering his cards. Further reference to the soluble or bleeding or smearing character of the color or ink is

contained in this Walsh-Caprio disclosure [p. 2, col. 1, ll. 21-28, R. 156] and it is to be noted that in the article, claims 3 and 4 [R. 156] which claim the composite sheet produced, reference is made to one of the sheets which bears bleeding colors. There is no substantial patentable difference between the Ballou identification card, as defined and disclosed in Ballou's patent claims, and the composite sheet or identification card produced in accordance with the Walsh-Caprio disclosure.

The fact that the print 1 of the drawing of the patent is a picture is wholly immaterial as to anticipation of the Ballou patent. Such illustration would be an identification means for identifying a person or property illustrated. Clearly, it would not amount to invention to substitute for this pictorial representation a man's name in printing or any other identifying matter. Appellee cannot stress too much the fact that the Ballou patent does not disclose or claim any particular identifying manner or means. The material consideration here is that in law the use of the card cannot form the basis for either patentable novelty or patentable invention *in the card itself*. It is not the use of the card that renders the card patentable, but it is the elements from which it is constructed. The Walsh-Caprio patent [Ex. 7] describes as well as claims, the things which the Ballou patent claims. The only material difference between the patents to Walsh and Caprio and to Goodsell and Maynard [Ex. 3] is that Walsh and Caprio *recognize that inks will bleed* when subject to the solvents and plasticizers necessarily

present in a cellulose cover, and that Walsh and Caprio disclose a cement between the cover and the card which will prevent the ink from bleeding during the manufacture. The article produced by the Walsh-Caprio process corresponds precisely with the so-called "identification card" of the Ballou patent claims. "* * * the color or colors of the print 1" are described as having "a tendency to run or bleed when the ordinary volatile liquid solvents or cement are used." [R. 155, col. 1, ll. 54-57.] "The compositing operation is preferably carried on by first using heat and pressure in a press, or its equivalent, and then cooling without completely removing the pressure." [Id. col. 2, ll. 19-22.]

Four formulae are given of a thermoplastic cement which is termed as "plasticizer". If cellulose acetate is used as a solvent to dissolve or remove the cellulosic cover, such solvent being a solvent of both the plasticizer and the ink or coloring matter, the fact is established that "it would be easily recognizable as having been tampered with." [Horwitz' testimony, *supra*, R. 106.]

Grounds of the District

Court's Decision.

"If the evidence offered by the patent holder is to be accepted, we have no discovery and therefore no patent, while on the other hand, if plaintiff's testimony is to be accepted by the court, we have a problem stated without the solution. Under either viewpoint the patent is clearly invalid.

“In view of the presumption of validity, I am accepting the testimony of the patent holder’s expert. The defendant patent holder by attempting to prove his patent complies with R.S.U.S. 4888 has convinced the court that his patent is not the result of inventive genius but at the most required only the work of one skilled in the art. As a matter of fact, I feel no discovery was made. The problem according to the defendant, was the finding of certain inks that would be dissolved or caused to bleed by the same solvent that would dissolve the transparent covering. The solvents for the coverings were well known, and if, as a matter of fact, all inks would be substantially affected by such solvents, the problem of discovering the proper ink did not exist.” [Opinion District Court, R. 21.]

The Questions Involved.

Appellee cannot accept Appellant’s statement of the questions herein involved, but submits that the determination of the following questions require affirmance of the appealed judgment:

1. Was the District Court in error in concluding that the production of the so-called “identification card” defined in claims 1, 2, 4 and 5 of the Ballou patent, did not require patentable invention?
2. Does the written description and the disclosure of the Ballou patent comply with the requirements of the Patent Statute R.S.U.S. 4888, 35 U.S.C.A., Sec. 33? If not, the patent is void.

SUMMARY OF ARGUMENT.

**The District Court Was Correct
in Concluding That the Ballou Patent
Did Not Disclose Patentable Invention.**

Ballou is not the first inventor or discoverer of printing identifying or distinguishing matter upon a card nor of enclosing such a card in a celluloid cover or envelope. This was fully disclosed in the Goodsell-Maynard Patent. Ballou was not the first inventor of a bleeding ink nor of a solvent which would dissolve celluloid and in dissolving it deface or dissolve the ink.

It is not invention to select a material and substitute it in an old environment in order to avail of the particular known properties of such substituted material.

The Ballou patent is void in view of the Goodsell-Maynard patent.

The Ballou patent is completely anticipated by the product produced by the Walsh-Caprio patent.

**The Ballou Patent Is Invalid as Not
Complying With the Requirements of the
Patent Statute R.S.U.S. 4888, 35 U.S.C.A., Sec. 33.**

Was the District Court in Error in Concluding That the Production of the So-called "Identification Card" Defined in Claims 1, 2, 4 and 5 of the Ballou Patent, Did Not Require Patentable Invention?

The Ballou patent describes an article of manufacture entitled "An Identification Card" which has three elements, (1) a cover that can be dissolved by a solvent; (2) a card disposed under the cover, and (3) distinguishing matter (upon the card) formed of an ink or coloring matter so constituted as to dissolve with the same solvent that dissolves the card [Claim 1 of Ballou patent, R. 46-47]. The other claims in suit, 2, 4 and 5, merely set forth the same elements in different language. They do not call for any additional or different things. The law requires that the patentee "particularly point out and distinctly claim the part, improvement or combination which he claims as his invention." (R.S.U.S. 4888, 35 U.S.C.A. §33.)

In law, the claim or claims of a patent are the definition of the invention. The claim prescribed by the Statute is for the purpose of making the patentee define precisely what his claimed invention is. (*Corn Products Ref. Co. v. Penick & Ford*, 63 F. 2d, 26, 31.) "Under the statute, it is the claims which define the invention * * * and each claim must stand or fall as itself sufficiently defining invention, independently of the others." (*Alltoona Publix Theatres, Inc. v. American Tri-Ergon*, 294 U.S. 477, 487, 79 L. ed. 1005, 1012.) (Cf. *Rip Van Winkle W. B. Co. v. Murphy W. B. Co.*, 1 F. 2d, 673, 676, C.C.A. 9; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 419, 52 L. ed. 1122, 1128; *Henry v. City of Los Angeles*, 255 F. 769, 780, C.C.A. 9.)

The only definition contained in any of the Ballou patent claims is the one just given and the District Court correctly so found in its Finding of Fact VIII [R. 33].

The Goodsell and Maynard patent, Plaintiff's Exhibit 3 [R. 138-140] is a complete anticipation of the alleged Ballou invention. This prior patent illustrates and describes a label. This label is formed of two sets of transparent substances, such as celluloid, between which is placed a card or label proper upon which there are marked identifications and the sheets of celluloid and paper subjected to heat and pressure to form a unitary structure. [Pltf's. Ex. 3, R. 139, col. 2, ll. 1-83.] There is no difference between a label and an identification card. The card can equally well be used to identify the variety of tree, plant, etc., as it can be to identify a human being. None of the Ballou claims point out or distinctly claim any part of his so-called identification card which distinguishes the Ballou card from the Goodsell and Maynard label. The claims of the Ballou patent specify only distinguishing matter made of the same solvent as will dissolve the cover. The undisputed testimony of the Appellant's expert is that all ink will dissolve and be defaced by the solvents for celluloid or the cellulose acetate cover [R. 106, 110]. As the testimony of Appellant's expert witness is true and undisputed at any place in the record, the solvents that would dissolve the cover of the Goodsell and Maynard patent would affect the ink (e. g., in which the words "Red Oak" are printed) and to a degree that would show tampering [R. 110]. In the patent law sense there is no differentiation in kind between the composite card of the Ballou patent and this Goodsell and Maynard label. The Ballou patent is not limited to novel means of identification. Compare Goodsell and Maynard description [R.

139, col. 2, ll. 89-98]: “The interposed identifying device, as it has been termed, may bear printing on both sides. For instance, in the case of a horticultural label, on one face of the identifying device could be printed the name of a flower or something of a similar character or even a symbol, while the opposite face might bear advertising matter of a florist or nurseryman.”

As said by the Supreme Court in *Ferdinand De St. Germain v. Emanuel Brunswick*, 135 U.S. 227:

“This case falls within the familiar rule that the application of an old process or machine or apparatus to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, although the new form of result may not have before been contemplated.”

As said in *Guthrie v. Curlett*, 10 F. 2d, 725, C.C.A. 2:

“A new method, art or process of making directories, dictionaries, encyclopaedia, or other compendious statements of written information, may be both new and useful, but the patent law is prosaically practical, it can never get away from the necessity of means, and unless patentable means of expressing or using the new idea are shown, there can be no valid patent.”

The Ballou patent neither illustrates nor describes nor claims any thing novel constituting a means for identification. The use, as a means for identification, of photographs, finger-prints, a description of the individual, name, age, place of birth, etc. on a card was in common use. Therefore, this distinction so attempted by defendant completely evaporates from the case.

It is well settled that

“‘It is not the result, effect, or purpose to be accomplished which constitutes an invention, but the mechanical means or instrumentalities by which the object sought is to be attained.’ *Kohler v. Cline Electric Mfg. Co.* (D.C.) 28 F. (2d) 405, 406. ‘The thing patented is the particular means devised by the inventor by which that result is attained, leaving it open to any other inventor to accomplish the same result by other means.’ *Electric R. Signal Co. v. Hall Ry. Signal Co.*, 114 U.S. 87, 5 S.Ct. 1069, 1075, 29 L. Ed. 96.”

Grand Rapids Show Case Co. v. Weber Show Case & Fixture Co., 38 F. 2d, 730, C.C.A. 9.

“The rule on that point is an aged one, and is stated in *Smith v. Nichols*, 21 Wall. 112, 88 U.S. 112, 119, 22 L. Ed. 566, as follows: ‘* * * But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. * * *’ ”

Bingham Pump Co. v. Edwards, 118 F. 2d, 338, 340 C.C.A. 9.

We cannot emphasize too much that a novel idea is not patentable; that the only thing patentable is the novel means by which such idea is rendered useful. That in determining the validity of the Ballou patent, the controlling consideration is, does such a patent disclose novel means. If not, the fact that one had conceived a more extended or different use for an old thing composed of

old means is not invention under our patent law. In this rule the term "means" is synonymous with the mechanical device or ingredients by which a given effect is secured. This rule of law is emphasized and applied in *Measure-graph Co. v. Grand Rapids Show Case Co.*, 29 F. 2d, 263, 275, C.C.A. 8, where the Court said:

"Clearly, Stocke had the idea of obstructing the throat (of the machine) to prevent errors, but ideas are not patentable. It is the means, or thing by which they may be accomplished that is within the law."

Cf. *Dyer v. Sound Studios of New York, Inc.*, 85 F. 2d, 431, 432, C.C.A. 3;

Greenewalt v. Stanley, 54 F. 2d, 195, 196, C.C.A. 3;

Farmers Cooperative Exchange v. Turnbow, 111 F. 2d, 728, C.C.A. 9.

Ballou was not the first inventor or discoverer of printing identifying matter upon a card nor of enclosing such card in a celluloid cover or envelope. It cannot be disputed that all this is fully disclosed in the Goodsell & Maynard patent. Nor was Ballou the first inventor of a bleeding ink, nor of a solvent which would dissolve celluloid and in dissolving it deface or dissolve the ink.

At most, Ballou only took the Goodsell-Maynard identification card and selected a well known ink from an old text book to fit his identification card together. *Appellant's own expert testified:*

"Q. How long have you known of solvents which would dissolve a plastic cover like cellulose acetate, and also dissolve an ink? A. For the past 30 years at least.

Q. Is that well known in the art? A. Oh, yes.

Q. Are there any textbooks that show that? A. Yes. There is one book by Krieger; there is another book by Wiborg; there are German and British publications, innumerable of them, and the paint industries publish textbooks also.

Q. How old are those textbooks? A. I have used them since 35 years ago, some of them."

In *Kalich v. Paterson Pacific Parchment Co.*, 137 F. 2d, 649 at 651, this Court said:

"Patentees are not entitled to a monopoly for the judicious use of materials the use of which would produce the result to be expected from such selection. Recognition is not invention."

The Supreme Court, on May 21, 1945, rendered its opinion in *Sinclair & Carroll Co., Inc. v. Interchemical Corp.* The case involved a patent on a printing ink. Invention was asserted in the selection of butyl-carbitol as a solvent because of its peculiar quality of being relatively non-volatile at ordinary room temperature, but highly volatile at a temperature of 150° C, a temperature at which paper can be safely heated without burning, although such a relatively non-volatile solvent at ordinary room temperature, but highly volatile at such higher temperature, produced an ink which would not dry at room temperature, but which would dry instantly upon application of heat after printing. The Supreme Court held no patentable invention existed in such selection of such solvent for its particular known properties, saying:

"Reading a list and selecting a known compound to meet known requirements is no more ingenious than selecting the last piece to put into the last opening

in a jig-saw puzzle. It is not invention. The judgment below is reversed.”

Such holding was not revolutionary. On the contrary, it was the mere application of a well-established doctrine of patent law:

“It is not invention to substitute superior for inferior materials in making one or all parts of a machine or manufacture. * * * There being no invention in substituting superior for inferior materials, there is certainly none in selecting from a number of materials, recommended by a prior patentee, that one which is best adapted to the purpose in view (*Welling v. Crane*, 14 Fed. 571 (1882)), and none in substituting one well-known form of a particular material for another well-known form of the same material.” (*Deller’s Ed., Walker on Patents*, Vol 1, pp. 179-180.)

No new or unexpected result was secured by Ballou in selecting bleeding ink for the printed matter for its known bleeding property when subjected to solvents. The testimony of Appellant’s expert establishes (1) that inks having such property were well known long prior to Ballou’s asserted invention; (2) that it would require invention to produce an ink by which the printing could be performed and not be subject to the dissolving action of the solvent used to dissolve the celluloid cover. Selection of a bleeding ink so dissolvable with the solvent for celluloid is the only differentiation from the card or label disclosed in the Goodsell-Maynard Patent 1,071,226, even if it be assumed that there existed an ink in which the printing could be performed, which ink would not be dissolved by

the action of acetate solvent contrary to the testimony of Appellant's expert [R. 95-110], who stated:

"No printing ink has yet been made that will withstand the action of acetate solvent. All vehicles that are used in printing ink will break down under the action of any acetate solvent." [R. 95.]

In *Abbott Machine Co. v. Universal Winding Co.*, 137 F. 2d, 166, at 169, the Court of Appeals, First Circuit, said:

"We only mean that now-a-days the emphasis in cases of this sort is less upon an analysis of the machine to see whether or not its parts cooperate to produce some new and useful result, and more upon an analysis of the machine and of the prior art to see whether or not the faculty of invention was required to put its parts together in such a way as to accomplish that new and useful result. This is illustrated by the recent case of *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 62 S.Ct. 37, 86 L. Ed. 58. In this case there is no discussion of the question of whether or not the parts assembled cooperate with one another, the court holding simply that although a new and useful result was achieved, it was not achieved by an exercise of the inventive faculty in putting the combination together. The court said (314 U.S. at page 88, 62 S.Ct. at page 39, 86 L. Ed. 58) citing the *Altoona Publix Theatres* case *supra*, that in its opinion 'the Mead device was not the result of invention but a "mere exercise of the skill of the calling", an advance "plainly indicated by the prior art" '; that the question before it in the case was 'whether it was invention for one skilled in the art and familiar with Morris and Copeland, and with the extensive use of the automatic thermostatic control of an electric heating circuit, to apply the

Copeland automatic circuit to the Morris removable heating unit in substitution for a circuit manually controlled' and it cited *Hailes v. Van Wormer*, and the cases which followed it, not in support of the test of cooperation of parts, but for the proposition that 'More must be done than to utilize the skill of the art in bringing old tools into new combinations.' "

The patent law does not recognize that the result, effect or purpose to be accomplished constitutes an invention, but that it is the mechanical means or instrumentalities by which the object sought is attained that is patentable under the statute, and that in determining whether or not an invention has been made, the Court should look at the machine, process or the manufactured article and ascertain how its cooperative parts are assembled and determine whether such assemblage is novel and whether to so assemble such parts required invention. Mere novel ideas or novel use of an old assemblage of instrumentalities does not constitute invention under the patent law. The pertinency in this case of this observation is that even if Ballou was the first to conceive that a useful purpose could be filled by imprinting upon a card in a bleeding ink, enclosing the card in a thermoplastic cover (e. g., celluloid or cellulose acetate) so that if the composite cover card be subjected to a solvent which would dissolve the cover it would necessarily cause the printing to be affected by the solvent, such conception did not amount to patentable invention *unless* invention was required to make such combination. In other words, a mere novel idea or concept (as it is sometimes referred to) is not patentable. The invention must exist in the *means* by which such concept is embodied in useful form. The Ballou patent does not disclose any physical part not in

the Goodsell-Maynard composite card. This principle has been considered in a great many adjudicated cases. In an early decision by the Supreme Court (*Aron v. Manhattan Railway Co.*, 132 U.S. 84) the Court adopted the opinion of Judge Wallace in the trial court (then Circuit Court) wherein Judge Wallace said:

“The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical application. It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion or organization of this character which were necessary to accommodate them to the new occasion. The present case falls within this category.’”

The Court of Appeals, Seventh Circuit, in *Voightmann, et al v. Perkinson, et al*, 138 F. 56, at 57, said:

“It is possible that Voightmann was the first to conceive that windows thus constructed would be a valuable adjunct to fire proof buildings. If so, it is the previousness of his conception that constitutes the merit of his so-called invention; for the mechanical embodiment of that conception is old. But it does not follow that a conception is patentable merely because it is first in time. Concept, alone, is not patent-

able. Concept must be accompanied by mechanical embodiment; and, as the law now stands, the mechanical embodiment, to make the invention patentable, must itself be unanticipated.

“Now in Voightmann’s patent, every mechanical element described is found to have pre-existed; to have pre-existed in the form utilized by Voightmann; to have pre-existed performing the functions performed in Voightmann’s device; and performing those functions to the same result. Voightmann possibly has pointed out to the world a wider use of the pre-existing art than was before known. But the discovery of an enlarged use is not, of itself, patentable invention.”

See, also:

Page Steel & Wire Co. v. Smith Bros. Hardware Co., 64 F. 2d, 512, 514, C.C.A. 6;

Kellogg Switchboard & Supply Co. v. Michigan Bell Telephone Co., 99 F. 2d, 207, 211-12.

“We are, however, primarily concerned with the means disclosed by Trotter for providing variation in the stroke of the ram, for, however meritorious may be the inventor’s thought in terms of result, unless the means adopted in attaining such result are novel and denote invention, either separately or in combination, he may not have a valid patent, for we are dealing with a machine and not a method. *Reo Motor Car Co. v. Gear Grinding Machine Co.* (C.C.A.) 42 F. (2d) 965, 968.”

Detroit Stoker Co. v. Brownell Co., 89 F. 2d, 422, 423, C.C.A. 6.

As said in *New York Belting & P. Co. et al v. Sierer, et al*, 149 F. 756, 769:

“The only new thought possible in the Furness patent is that rubber or yielding tile will bend and stretch more easily and more readily and safely than those made of wood, stone, brick, cement or iron. To ‘think’ that, when it was common knowledge, and only required the action of memory, was not the kind, degree, and quality of ‘thought’ mentioned and referred to by the Supreme Court of the United States in *Cash Reg. Co. v. Cash Indicator Co.*, 156 U.S. page 514, 15 Sup.Ct. 434, 39 L. Ed. 511. The thought there referred to is the conception or the origination of an idea, not the recalling to memory or the mere remembrance of a fact known or presumed to be known.”

The Walsh & Caprio patent 2,079,641 describes and discloses both a process and an article of manufacture resultant from such process which completely anticipates Claims 1, 2, 4 and 5 of the Ballou patent. This patent states:

“An object of our invention, therefore, is to provide a cement which will not cause blushing, bubbles, or pockets and will not cause colors to run or bleed.”

[Walsh-Caprio, p. 1, ll. 19-22.]

The drawings show a print or card 1 “having a paper base,” and “having an outer colored surface 2.” [ll. 44-47.]

The patent states:

“It is assumed for the purposes of illustration that the color or colors of the print 1 have a tendency to run or bleed when the ordinary volatile liquid solvents or cements are used. To overcome this tendency of the colors to run or bleed, we use between sheet 4 and print 1, a cement 5 in sheet form

comprising substantially non-volatile solvents for the cellulosic plastic, preferably combined with at least a small proportion of the particular cellulosic plastic. The presence of at least a small proportion of the cellulosic plastic is particularly preferred where the non-volatile solvents are of an oily nature, in order that the cement may be maintained in sheet or other solid form. The use of a proportion of the cellulosic plastic also aids in producing a final product which is substantially homogeneous throughout, except for the print or its equivalent." [p. 1, col. 1, *l.* 54, to col. 2, *l.* 12.]

The patent contains complete formulae setting forth in detail the composition of the so-called thermoplastic cements. Formulae A and C refer to cellulose acetate and formulae B and D refer to cellulose nitrate as the main ingredients and the other chemicals in the formulae as plasticizers or thinners. "Cellulose acetate" and "cellulose nitrate" as well as celluloid are well known clear, plastic substances, all usable for covering the surface of an identification card. They have no visible physical differences. Either of these correspond with exactitude to celluloid or the "different transparent materials" which may be used instead of celluloid as set forth as equivalents in the Ballou patent. Plaintiff uses cellulose acetate in covering his cards. Further reference to the soluble or bleeding or smearing character of the color or ink is contained in this Walsh-Caprio disclosure, p. 2, col. 1, *ll.* 21-28, and it is to be noted that in the article claims 3 and 4, which claim the composite sheet produced, reference is made to one of the sheets which bears bleeding colors. It is not possible to differentiate the Ballou identification card from the composite sheet or identification card produced in accordance with the Walsh-Caprio disclosure.

Does the Written Description and the Disclosure of the Ballou Patent Comply With the Requirements of the Patent Statute R.S.U.S. 4888, 35 U.S.C.A., Sec. 33? If Not the Patent Is Void.

The District Court realized that Appellant's case presented a dilemma. Either the Ballou patent does not disclose and claim a patentable invention or the patent is invalid because it does not contain a written disclosure of the invention and a claim specifying the invention.

Under the Patent Statute the Ballou patent does not contain a sufficient disclosure to enable one skilled in the art to make the article claimed therein *unless the card, its composition, etc. was common knowledge; unless the so-called distinguishing matter printed on the card was common knowledge; unless the composition of the cover was common knowledge; unless the firm securance of the cover to the card was common knowledge; unless the ink or coloring in which distinguishing matter is superposed on the card was a matter of common knowledge, and unless it required merely the selection of an ink for its known property of being soluble in the same solvent that would dissolve the cover.* Therefore, either the Ballou patent is invalid because of such insufficient description or it is invalid for want of invention because all these factors were part of the common knowledge and it required no invention to select these elements and put them together in the form and manner claimed in the Ballou patent.

Inasmuch as Ballou in the Patent Office admitted by the cancellation of Application Claim 6 [R. 52] that the sole novelty claimed by him was the use of an ink soluble in the solvent which would dissolve the cover, nothing patentable remains disclosed in either of Claims 1, 2, 4 or 5

of the patent unless such an ink was unknown and not at hand for selection for use of such property. If the Court could disregard and set aside the uncontradicted testimony of Appellant's expert Horwitz and conclude that it required invention to produce an ink or coloring matter which would be soluble in the solvent which would dissolve the ink or coloring matter, then the Ballou patent sets forth merely a problem to be solved. The patent law authorizes the grant of patents for solving patents and not for stating them.

"A patent is granted for solving a problem, not for stating one. Its description must explain the invention itself, the manner of making it, and the mode of putting it into practice. In the absence of knowledge upon these points, the invention is not available to the public without further experiments and further exercise of inventive skill. A claim for a combination which embraces an element only in case it is made capable of being employed in the combination and without disclosing means of adapting it, discloses nothing definite."

Columbia Motor Car Co. v. C. A. Duerr Co., 184 F. 893, 908, C.C.A. 2.

In *Permutit Co. v. Graver Corp.*, 284 U.S. 52 at 60, it is said:

"* * * The statute requires the patentee not only to explain the principle of his apparatus and to describe it in such terms that any person skilled in the art to which it appertains may construct and use it after the expiration of the patent, but also to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not."

In the absence of any such teaching in the Ballou patent it falls within the decision of *General Electric Co. v. Wabash Appliance Corp.*, 304 U.S. 364, wherein neither the claims nor the specification taught what size or contour of comparatively large grains of tungsten prevented substantial sagging or offsetting. (Cf. *Farmers Co-operative Exchange v. Turnbow*, 111 F. 2d, 728, 731, C.C.A. 9.)

Conclusion.

It is respectfully submitted that the appeal judgment should be affirmed.

Respectfully submitted,

LYON & LYON,
FREDERICK S. LYON,
FREDERICK W. LYON,
Attorneys for Appellee.

No. 11008.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious name
of Whitehead & Co.,

Appellee.

APPELLANT'S REPLY BRIEF.

HERBERT A. HUEBNER,

520 Title Insurance Building, Los Angeles 13,

Attorney for Appellant.

FILED

SEP 21 1945

TOPICAL INDEX.

	PAGE
Respondent's argument	1
The prior art.....	5
Ballou invention distinguished from prior art.....	6
The bleeding ink.....	8
Not "mere selection".....	10
Sufficiency of disclosure.....	12
Invention involved in the Ballou patent.....	13

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Pittsburg Iron & Steel Co. v. Seman-Sleeth Co., 248 Fed. 705....	8
Shakespeare v. Perrine Mfg. Co., 91 Fed. (2d) 199.....	12
Sinclair & Carroll Co. v. Interchemical Corporation, 89 Sup. Ct. (Adv. Ops.) 1099.....	10

TEXTBOOKS.

1 Walker on Patents (Deller's Edition), p. 291.....	7
1 Walker on Patents (Deller's Edition), p. 1238.....	12

No. 11008.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OTTO H. KRUGER,

Appellant,

vs.

NED WHITEHEAD, doing business under the fictitious name
of Whitehead & Co.,

Appellee.

APPELLANT'S REPLY BRIEF.

Respondent's Argument.

Respondent's brief is noteworthy for its complete reversal of the position taken by respondent in the District Court. There respondent maintained that no ink could be found that would bleed under the action of all solvents for the cellulose acetate cover. Note Whitehead's testimony relative to Plaintiff's Exhibits 9-A through 9-H [118]*:

"A. . . . some of these chemicals change the color the way this shows and other chemicals do not seem to change it at all. * * * Ethyl acetate does not change the color.

* * * * *

*Throughout this brief, the numbers enclosed in brackets refer to page numbers of the Transcript of Record on Appeal.

Q. Are all those chemicals listed in the solvents?

A. Every one of them.

* * * * *

Q. Then from the chart * * * methyl ethyl ketone would disfigure the ink so that it would be readily recognizable * * * A. Yes.

Q. While ethyl acetate and butyl acetate and methyl formate, for instance, would not? A. No.

* * * * *

Q. I call your attention to one specifically, 'Red RT-814.' I call your attention to the fact that the butyl acetate on here, when looked at this way carefully, you can see that it is slightly changed in color. Would that be sufficient to ground a card at a plant? A. No. This identification card, for example, if this was exposed to the sunlight for 24 hours, it would probably fade more than it is here. * * *"

But upon appeal the respondent has executed an about-face and relies upon the erroneous finding X [23], "That all inks would be substantially affected by the use of a solvent for the acetate cover," which finding in turn is based upon the District Court's misinterpretation of the aggregate testimony of Horowitz. From this unsound premise and select fragments of Horowitz's testimony (Appellee's Brief p. 5), respondent seeks to draw the conclusion that there is "no ink known which is not defaced by solvent" (Appellee's Brief p. 5). Applying this latter conclusion, one is invited to infer that any ink will bleed under the action of any solvent.

But the testimony of Horowitz does not support finding X as has heretofore been pointed out (Appellant's Brief p. 22).

The testimony of Horowitz cited by respondent at page 7 of his brief is incomplete and misleading as the following answer by the witness [R. 104] clearly shows [104]:

“Q. But any ink that was used up to today would bleed or run? A. Not necessarily. I want to get this clear. *I made a statement before, and I want to clarify the thing* * * * We have never succeeded in making an ink that would *resist* the action of a cellulose solvent. That is what I meant. *The question of the bleeding of color is an entirely different proposition.* Then we can use a *select* pigment that will commonly bleed under the action of almost any solvent.” (Emphasis added.)

The testimony of Horowitz specifically named the following inks which do not bleed:

“non-solluble carbon black”, Tr. 105;

“the monastral group”, Tr. 107;

“the sulphocyanine colors”, Tr. 107;

“tungstated colors”, Tr. 107, 108;

“molybdated colors”, Tr. 107, 108;

“Prussian blue”, Tr. 109;

“English vermilion”, Tr. 109;

“mercury red”, Tr. 109;

“chrome yellows”, Tr. 109.

This effectively refutes respondent’s contention that appellant’s witness said that no printing ink has yet been made that will withstand the action of a cellulose solvent (*cf.* Respondent’s Brief pp. 5 and 6).

And as counsel for the respondent continued to receive increasing evidence of two types of inks, those containing a bleeding pigment, and those not containing it, the cross-examination was cut short [109].

“A. I went off the deep end when I limited myself to black.

Mr. Frederick W. Lyon: That is all.”

It should also be noted that the quotations from Horowitz’s testimony beginning on page 5 of Appellee’s Brief and taken from the top of page 106 of the Reporter’s Transcript should be read together with the preceding paragraph at the bottom of page 105 of the Transcript to avoid misconstruction of the language. The testimony is not that the mere application of a solvent (as required by the Ballou patent) defaces a fixed type of ink so that “it would be easily recognizable as having been tampered with.” The question refers to *re-coating the ink* not merely dissolving it [105]:

“Q. It is true, isn’t it, that any ink manufactured will be defaced, so that tampering with it would seem [be seen] when acetone or ketone are applied to it?

A. No. You can make a nonsoluble carbon black, for example that will bond itself into the fibre of the paper. If I could elucidate a little bit, you might be able to wash this acetate off, and you would still have a residue of ink on there that might not have been badly defaced, *but when you try to build it up again to what it originally was, that is when your troubles would come. They might be able to remove that in fairly good shape, but they would never be able to build it up again. * * **” (Emphasis supplied.)

Horowitz's testimony goes only to the extent of showing that there were suitable inks available. It does not go so far as to prove that *all* inks are equally suitable. Furthermore, it is restricted to *ink*. Horowitz's testimony refutes appellee's position taken at the trial that no inks were suitable and it accords with the advertised statements of appellee that the inks were "specially prepared" to "bleed and change color" [71, 72].

The Prior Art.

Every phase of the prior art relied upon by appellee was considered in the proceedings before the Patent Office either as concerns the several elements comprising the identification cards or their particular properties [Plfs. Ex. 1].

In order to anticipate, a prior art patent must embody the same means and be used for the same purpose. It is not sufficient that such prior art patents may doubtfully or merely accidentally resemble the article of manufacture of the patent in question.

The pertinency of the prior art was expressly negatived by the District Court: "I want to say frankly that I am not much impressed by the prior art" [135].

In the lower court respondent succeeded in excluding appellant's proffered construction of the prior art. That the Goodsell-Maynard patent, No. 1,710,226, contains no statement regarding the type of ink or coloring matter used is admitted by appellee (Appellee's Brief p. 4), nor, as stated by the Board of Appeals [53], would such disclosure, if made, be of any significance in view of the intended use and nature of the Goodsell-Maynard label.

The Walsh-Caprio patent. No. 2,790,641, relied upon by appellee as setting forth a process, the product of which is alleged to be indistinguishable from Ballou's forgery-proof identification card, such a conclusion is merely speculative. For example, it is stated in the Walsh-Caprio patent that [Tr. 155] "*volatile liquid solvents or cements very often cause blushing bubbles and pockets between the conceptive parts and cause many colors to bleed or run such as to produce very unsatisfactory results.*" Can it be inferred from such language that the inks used by the Walsh-Caprio would bleed, not merely in the fluid state of the thermo-plastic cover, but, as required by Ballou, under the dissolving action of *all* solvents for said cover? The dissolving action of a plastic in its fluid state is not shown to be, nor is it, the same as the dissolving action of a *solvent* for the *solid* thermoplastic.

Ballou Invention Distinguished From Prior Art.

The value of Ballou's forgery-proof identification card lies in its betrayal of the use by a forger of *any* and *all* solvents upon the cover. Even if it be conceded, therefore, that the prior art devices may be defaced by the use of one or more solvents, that fact would not demonstrate their suitability if *other* solvents are used. A forger cannot be required to use only those solvents specified and which induce "cooperation" or *co-action*, *i. e.*, which both dissolve the cover and cause the distinguishing matter to run. Clearly, no prior art patent even suggests such a constant co-acting principle and in failing to do so, they do not anticipate the article of manufacture contemplated

in the Ballou patent. For if the cover may be dissolved by even so much as a *single* known solvent which does not at the same time cause the distinguishing matter to distort in a "clearly indicated" manner [46] the identification card would be neither "fool-proof" nor "forgery-proof." This fact was fully recognized by respondent at the trial when he was seeking to prove that no ink would bleed under the action of *all* solvents for the cover [122].

"Q. Well, you didn't have any trouble to get an ink that would be dissolved by the same solvents that would dissolve the cellulose acetate? A. (By Ned Whitehead) That wouldn't do any good for identification cards. *How do you know they wouldn't get a solvent that would hurt the ink, and then you wouldn't have an identification card that was fool-proof.*" (Emphasis added.)

This one to one cooperation between the distinguishing matter and the cover is the keystone of the Ballou patent and serves to set it boldly apart from either or both of the Walsh-Caprio and the Goodsell-Maynard patents. It finds expression in Walker on Patents (Deller's Edition), Vol. 1, page 291:

"Although a prior art may incidentally show a similar arrangement of parts, if that arrangement is not claimed nor designed to perform the function of the later patent, it cannot serve as an anticipation." . . . "Novelty is not negatived by anything which is not designed for the same purpose, where no person using it would understand that it

could be put to use in the way the inventor has found.”

Especially clear is the language of *Pittsburg Iron & Steel Co. v. Seman-Sleeth Co.*, 248 Fed. 705 (C. C. A. 3):

“If any one of the alleged anticipating alloys was Adamite, that fact, so far as the record shows, was not known to those who produced it or used it, and not being recognized as a new product with its distinctive characteristics, its production was purely an accident without profit to the art and without value as an anticipation. We are satisfied therefore, that Adamite has not been anticipated by alloys which, while accidentally of the same analysis, *were not shown to be the ‘article of manufacture’ of the patent.*”

The Bleeding Ink.

The selection of an ink for the Ballou forgery-proof identification is deliberate and not accidental, is purposeful and not an undesirable result.

The type of ink used in the Goodsell-Maynard label is of no importance and its nature is not even mentioned therein. Its mention “would have no object at all” [Tr. 53].

The Walsh-Caprio patent mentions a bleeding ink only as a problem to be avoided.

Neither Goodsell-Maynard nor Walsh-Caprio teaches the *use* of an ink which bleeds.

The ink required by Ballou must bleed *always*, *i. e.*, to defeat *every* attempted solution of the cover. It is not sufficient that it bleed merely incidentally or "sometimes" or under *some* solvents for the cover. To be fool-proof it must bleed under *every* solvent for the cover. Thus if the cover is a water-soluble gelatine, the ink must bleed in water or *any other* solvent for the gelatine. It is not enough if the ink bleeds only in water and the gelatine may be dissolved in alcohol [122].

Neither Goodsell-Maynard nor Walsh-Caprio contains a reference to a bleeding ink meeting these requirements.

Goodsell-Maynard and Walsh-Caprio are in an art entirely distinct from Ballou. They do not relate to the same subject matter, nor to the same materials, nor to the same objects, nor to the same product.

Ballou is in "an art entirely distinct from any of the references" [53, Opinion of Patent Office Board of Appeals]. It is idle to suggest that the Ballou patent is anticipated. His patent is pioneer. He founded a new industry of commercial and social importance. His invention was directly used by a large percentage of the working population of America. These people were not using or demanding the "*cement* which will not cause colors to run or bleed", "blush", "bubble", or "pocket" offered by Walsh-Caprio, nor did they desire the mere printing or a photograph on a piece of paper protected from "the elements" [139, lines 25-26, 80-84] offered by Goodsell-Maynard.

Not "Mere Selection."

Respondent appears to take the position that Ballou was faced with the problem of finding a new type of ink. From this premise it might be relatively simple to show that inks with bleeding properties were known and that Ballou did no more than select a suitable ink from a list as was done in the cited case of *Sinclair & Carroll Co. v. Interchemical Corporation*, 89 Sup. Ct. (Advance Opinions) 1099 (Appellee's Brief p. 19).

But such a premise misconstrues the invention. Ballou did not discover nor even seek to discover an ink. His invention includes ink merely as one of several types of possible solvent detecting means such as ink, coloring, or a photograph [45-46]. Why does respondent point only to ink? Why does he not emphasize that celluloid is old, that a card proper is old, that solvents are old, or even that a card and cover are old and that each of these elements is to be found listed in one or more places? Is it that excessive emphasis placed upon each separate element as individually known would merely point up the obvious fact that Ballou's invention resided in no one of these elements but rather in the patented combination incorporating them all in the specified relationship? Ballou did not select his forgery-proof identification card from a *list of forgery-proof identification cards* for the simple reason that no such list existed. There was no such thing in existence as a forgery-proof identification card—nor even the concept of such a card—until Ballou's invention.

Horowitz [103]:

“I don’t believe that anybody before had conceived the idea of a foolproof, forgery-proof identification pocket, and the question was to make them so foolproof that nobody could possibly tamper with them, and that was something new.”

The court [133]:

“While the patent has been referred to as a simple patent, yet it indicates that there has been an improvement here of technique in the making of identification cards which have some features that are quite unique.”

Confusion over the gist of Ballou’s invention—and failure to comprehend its total character has been such that each separate element—even including the solvent [Finding XII, 23] was mistaken at one time or another for the inventive combination (*cf.* Appellee’s Brief p. 13).

In order to clinch his point that any invention lies in the ink *per se* respondent cites the rejection of application of claim 6 and asserts that thereby appellant is “estopped” to deny that the gist of the invention lies in the ink. Actually claim 6 was rejected [Plfs. Ex. 1] because it was too broad and the “means to disclose tampering” purported to include *any* tampering, “it being immaterial according to the claim whether a solvent is used in such tampering” [Opinion of Board of Appeals, 53], thus even a “sharp blade” might be used [*cf.* Office Action of May 29, 1935, Plfs. Ex. 1].

Sufficiency of Disclosure.

The patent is entitled to a broad construction favorable to the patentee since the trial court agrees with and accepts the patent office's view that the prior art does not disclose Ballou's inventive concept. Walker on Patents (Deller's Edition), Vol. 1, p. 1238; *Shakespeare v. Per-rine Mfg. Co.*, 91 Fed. (2d) 199 (1937, C. C. A. 8):

“One who first invents a unique feature is entitled to a liberal construction of what he first brought into the art.”

The only evidence by which insufficiency of disclosure may be demonstrated is by the testimony of an expert, *i. e.*, one skilled in the art. No expert testimony other than that of Horowitz was introduced below and that was to the uncontradicted effect that one conversant with the art would have no difficulty in carrying out the specification of the Ballou patent. The District Court expressly acknowledged the sufficiency of the disclosure [134] and contradicts Finding IX [23], which is clearly erroneous and contrary to the uncontradicted evidence on this point. In spite of its protestations to the contrary, to the effect that, to this date no suitable ink has been found, the appellee has been able to advertise that its “specially prepared” inks will “bleed and change color” when subjected to the action of a solvent for the thermo plastic cover.

Invention Involved in the Ballou Patent.

The concept of a new article of manufacture and the adaptation of appropriate means embodying that concept constitutes invention.

It is respectfully submitted that the record below abounds in evidence of invention, and that the *prima facie* case of invention, established by the introduction of the patent in evidence as well as by the other ample evidence of invention introduced at the trial, was not overcome by appellee.

Respectfully submitted,

HERBERT A. HUEBNER,

Attorney for Appellant.

No. 11014

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

VERNON ECKMAN and ALEX KARVONEN,

Appellees.

Transcript of Record

Upon Appeal from the District Court for the Territory of
Alaska, Third Division

FILED

JUN 13 1945

PAUL P. O'BRIEN,
— CLERK

No. 11014

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

VERNON ECKMAN and ALEX KARVONEN,
Appellees.

Transcript of Record

Upon Appeal from the District Court for the Territory of
Alaska, Third Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavits of Edward V. Davis	8, 11
Answer	14
Appeal:	
Certificate of Clerk to Transcript of Record on	39
Citation on	35
Notice of	29
Order Allowing	34
Petition for	30
Praecipe on	36
Assignment of Errors	32
Certificate of Clerk to Transcript of Record on Appeal	39
Citation on Appeal	35
Claim of Property	10
Demurrer, Filed April 7, 1941	20
Hearing Thereon	21
Demurrer, Filed December 17, 1943	26
Hearing Thereon	27

Index	Page
Exceptions to Libel	12
Libel of Information	2
Minute Orders:	
August 17, 1942—Order of Continuance...	20
May 3, 1943—Order Setting Cause for Trial	21
May 5, 1943—Order Overruling Demurrer to Defendant's Answer	22
October 9, 1943—Order Setting Time for Hearing on Demurrer	26
October 13, 1944—Rendering Decision...	27
November 16, 1944—Order of Dismissal..	29
Monition	6
Motion for Continuance	9
Motion for Judgment on the Pleadings.....	23
Motion for Leave to File Demurrer to Second Affirmative Defense of the Answer.....	24
Motion to Withdraw Exceptions to Plaintiff's Libel, and to File Answer	19
Names and Addresses of Attorneys of Record	1
Notice of Appeal	29
Order Allowing Appeal	34
Order for Issuance of Monition and Service of Notice	4

Index Page

Order Granting Leave to File Demurrer.....	25
Petition for Appeal	30
Praeipce	36
Praeipce for Subpoena on Behalf of United States	28

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

NOEL K. WENNBLOM,

United States Attorney,
Anchorage, Alaska,

Attorney for United States of America,
Plaintiff and Appellant.

DAVIS & RENFREW,

Attorneys at Law,
Anchorage, Alaska,

Attorney for Vernon Eckman and Alex
Karvonen, Defendants and Appellees.

In the District Court for the Territory of Alaska,
Third Division

No. V-2370, Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

20 BEAVER SKINS and VERNON ECKMAN
and ALEX KARVONEN,

Defendants.

LIBEL OF INFORMATION

The libel of information of Joseph W. Kehoe, United States Attorney for the Third Division of the Territory of Alaska, who prosecutes on behalf of the United States of America and being present in Court in his proper person in the name of the United States of America and against 20 Beaver Skins and Vernon Eckman and Alex Karvonen and all of the persons intervening therein, in a cause of forfeiture, alleges as follows:

I.

That Carlos M. Carson, a duly appointed, qualified and acting Wildlife Agent, acting in his official capacity as such, did, on or about the 18th day of May, 1940, within the Third Division of the Territory of Alaska, seize 20 Beaver Skins which were then and there in the possession of Vernon Eckman and Alex Karvonen, and turned the same over to the custody of James H. Patterson, United States Marshal for the Third Division of the Terri-

tory of Alaska, and the said United States Marshal now has the same in his possession. [2]

II.

That the said 20 Beaver Skins above described were possessed by the said Vernon Eckman and Alex Karvonen in violation of the Alaska Game Laws and the rules and regulations promulgated thereunder and the statute in such case made and provided and against the peace and dignity of the United States of America, in that the said Vernon Eckman and Alex Karvonen, between the 10th day of April, 1940 and the 10th day of May, 1940, at and within the Katmai National Monument, Third Division, Territory of Alaska, said Monument being then and there an area wherein a continuous closed season exists on all land fur bearing animals, take and kill said 20 beaver, and did then and there possess and transport said beaver skins within and outside of said Katmai National Monument aforesaid.

III.

And the said Attorney for the United States, on behalf of the United States, says that all and singular the premises are true and by reason thereof and by force of the statute in such case made and provided the said 20 Beaver Skins are forfeited to the United States of America.

Wherefore, he prays the usual process and monition of this Honorable Court to issue in this behalf; and that said Vernon Eckman and Alex Karvonen and other interested persons be cited and admonished in general and special to answer the

premises, and all due proceedings being had thereon, that for the causes aforesaid and others appearing the said 20 Beaver Skins, as above set forth, be condemned by the definite sentence and decree of this Court as forfeited to the use of the United States in such case made and provided and the rules and regulations pertaining thereto.

/s/ JOSEPH W. KEHOE

United States Attorney [10]

United States of America,
Territory of Alaska—ss.

Joseph W. Kehoe, being first duly sworn on his oath, deposes and says: I am the United States Attorney for the Third Division, Territory of Alaska; I have read the foregoing libel of information, know the contents thereof and believe the same to be true.

/s/ JOSEPH W. KEHOE

Subscribed and sworn to before me this 15th day of August, 1940.

[Seal] /s/ CURTIS R. MORFORD

Deputy Clerk, District Court.

[Endorsed]: Filed Aug. 17, 1940. [4]

[Title of District Court and Cause.]

ORDER FOR ISSUANCE OF MONITION AND
SERVICE OF NOTICE

Upon reading and filing the Libel of Information of Joseph W. Kehoe, United States Attorney for

the Third Division of the Territory of Alaska, praying for process and for a decree of this Court forfeiting to the United States of America 20 beaver skins, described in said Libel of Information, and seized by Carlos M. Carson, Wildlife Agent in and for the Territory of Alaska, on the 18th day of May, 1940, at Naknek, Alaska, because and for the reason that the same were taken and killed within the Katmai National Monument, an area wherein a continuous closed season exists on all land fur bearing animals, and also praying for process of monition to all persons setting up or asserting any titles or rights of property, claim or demand of any kind in or to said skins of any of them, and particularly to Vernon Eckman and Alex Karvonen, it is therefore

Ordered that a monition be issued by the Clerk of this Court, citing the said Vernon Eckman and Alex Karvonen and all other persons asserting any right, title, claim or demand of any kind in or to any of said 20 beaver skins, to [5] appear and be in this Court and make proof of their respective claims in open Court at the Courtroom of said Court in the City of Anchorage, Alaska, on the 14th day of October, 1940, at 10 o'clock in the morning of said day, or be forever barred and precluded therefrom; and it is further

Ordered that the United States Marshal for the Third Division of the Territory of Alaska make service of this monition by posting copies of the same in three public places within the Third Division of said Territory and by mailing copies of

the libel of information to Vernon Eckman and Alex Karvonen, at Naknek, Alaska, together with a copy of the monition.

Dated at Valdez, Alaska, this 26 day of August, 1940.

/s/ SIMON HELLENTHAL
District Judge

Entered Court Journal No. V-20, Page No. 122.
Aug. 26, 1940.

[Endorsed]: Filed Aug. 26, 1940. [6]

[Title of District Court and Cause.]

MONITION

The President of the United States of America,
to the United States Marshal for the Third
Division, Territory of Alaska, Greeting:

Whereas a libel of information has been filed in the District Court for the Territory of Alaska, Third Division, against 20 Beaver Skins by Joseph W. Kehoe, United States Attorney for said Division and Territory, and against said Vernon Eckman and Alex Karvonen, said skins having been seized by Carlos M. Carson, Wildlife Agent for Alaska, from the said Vernon Eckman and Alex Karvonen, of Naknek, Alaska, and claims that said 20 beaver skins are forfeited to the United States for the reasons and causes in said libel alleged and mentioned, and praying for the usual process and monition of the said Court in that behalf to be

made and that all persons interested in said 20 beaver skins may be cited in general and special to answer the premises and all proceedings being had the said 20 beaver skins be condemned and forfeited to the said United States.

You are therefore commanded to detain said 20 beaver skins in your custody until the further order of this Court, and to give due notice to all persons claiming the [7] same or knowing or having anything to say why the same should not be condemned and forfeited to the United States pursuant to the prayer of said libel of information, and particularly to Vernon Eckman and Alex Karvonen, whose addresses are Naknek, Alaska, that they be and appear before said Court at Anchorage, Alaska, on the 14th day of October, 1940, at the hour of ten o'clock in the morning of said day, and you are hereby Ordered to make service of this monition upon all such persons as are described by posting copies thereof in three public places within the Third Division of said Territory, and by mailing a copy of this monition and of said libel of information to the above mentioned Vernon Eckman and Alex Karvonen, whose addresses are Naknek, Alaska, and hereon make due return to this Court.

Witness the Honorable Simon Hellenthal, Judge of said Court, and the Seal of said Court hereto affixed this 26th day of August, 1940.

[Seal] /s/ M. E. S. BRUNELLE

Clerk District Court

United States of America,
Territory of Alaska—ss.

This is to Certify that I received the attached and foregoing Monition on the 26th day of August, 1940, and that I served the same on the 26th day of August, 1940, by posting three copies of said Monition in three public places in the Third Division of Alaska, to wit: One on bulletin board of Valdez Post Office, one on bulletin board at front door of Court House and one on bulletin board at the Pinzon, in the Town of Valdez and by mailing on said date a copy of said Monition and of the Libel of Information to Vernon Eckman and Alex Karvonen, of Naknek, Alaska.

Dated at Valdez, Alaska, this 26th day of August, 1940.

JAMES H. PATTERSON

U. S. Marshal

By J. M. REGAN

Deputy.

[Endorsed]: Filed Aug. 26, 1940. [9]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska,
Third Judicial Division—ss.

Edward V. Davis being first duly sworn deposes and says: That the firm of Davis & Renfrew was

retained on or about the ninth day of October, 1940, to represent the defendants Vernon Eckman and Alex Karvonen, and to make their claim for the above mentioned Beaver skins. That defendants reside at Naknek, and that communication with that place has been interrupted for a large part of the time since this case was turned to the firm of Davis & Renfrew, due to bad flying weather. That in order for defendants' attorneys to prepare a defense to this action and a claim for such Beaver skins, it is necessary that defendants' attorneys have more information from the defendants, and in particular about a certain Court Action held at Naknek in this connection. That defendants request thirty days additional to get this information.

EDWARD V. DAVIS

Subscribed and sworn to before me this fourteenth day of October, 1940.

[Seal]

MARY E. FASNACHT

Notary Public for Alaska

My Commission expires 10/19/43.

[Endorsed]: Filed Oct. 14, 1940. [10]

[Title of District Court and Cause.]

MOTION

Comes now Vernon Eckman and Alex Karvonen, of the defendants named above, and move the Court that a Continuance may be granted in this matter in order to enable defendants to prepare their de-

fense and their claim to the above named Beaver skins.

This motion is based on all the records and files in this action, and upon the affidavit of Edward V. Davis, of defendants' attorneys.

Dated this fourteenth day of October, 1940.

VERNON ECKMAN and
ALEX KARVONEN,
By DAVIS & RENFREW,
Per EDWARD V. DAVIS

[Endorsed]: Filed Oct. 14, 1940. [11]

[Title of District Court and Cause.]

CLAIM OF PROPERTY

Comes now Verner Eckman and Alex Karvonen, the above named individual defendants, by and through their agents and attorneys-in-fact, Davis & Renfrew, and they are the owners in common of that certain property described above as twenty Beaver Skins, and that they are entitled to the possession thereof. That such beaver skins were lawfully taken by the defendants Verner Eckman and Alex Karvonen under the provisions of the Alaska Game Laws, and under the rules promulgated in accordance therewith, and that such skins were wrongfully taken from said defendants and are being wrongfully withheld from them.

Wherefore the defendants Verner Eckman and Alex Karvonen lay claim to the afore mentioned

twenty beaver skins and pray that the same may be returned to them.

VERNER ECKMAN and
ALEX KARVONEN,
By DAVIS & RENFREW
/s/ By EDWARD V. DAVIS

AFFIDAVIT OF EDWARD V. DAVIS

United States of America,
Territory of Alaska,
Third Judicial Division—ss.

Edward V. Davis, being fully duly sworn, upon his oath deposes and says: That he is a partner in the firm of [12] Davis and Renfrew, and that as such partner he has the authority to act for the defendants *Verner Eckman* and *Alex Karvonen* in the above entitled matter under and by virtue of a certain power of attorney given the firm of Davis and Renfrew by the said defendants. That he has investigated the circumstances of the seizure of the above mentioned Beaver skins, and believes such seizure to have been made wrongfully and without legal sanction. That he believes that the foregoing claim of *Verner Eckman* and *Alex Karvonen* is just and legally justified. That he has read the within and foregoing Claim of Property, knows the contents thereof, and that the same is true as he verily believes. That he believes the claimants to be the true and bona fide owners of the property described as twenty beaver skins. That he makes this affidavit of verification for the defendants *Verner Eckman* and *Alex Karvonen* for the reason

that the defendants Verner Eckman and Alex Karvonen are not at the place where this claim has been prepared or at the place where this matter is pending, but are in fact in the remote interior of the Territory of Alaska at a point far from any reasonable method of communication.

/s/ EDWARD V. DAVIS

for Verner Eckman and Alex
Karvonen, Claimants.

Subscribed and sworn to before me this fifteenth day of November, 1940.

[Seal]

MARY E. FASNACHT

Notary Public for Alaska

My commission expires 10/19/43.

Copy of this claim received this 22nd day of November, 1940.

/s/ H. P. NOGGLE

[Endorsed]: Filed Nov. 22, 1940. [13]

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL

Comes now Verner Eckman and Alex Karvonen, the owners and claimants of the above described Beaver Skins, and hereby except to the libel of information against such skins by Joseph W. Kehoe, for the following reasons:

First: Such libel does not specify where in the Third Division, Territory of Alaska, such skins

were seized, and whether such seizure was made upon land or upon water.

Second: That such libel of information does not state as to where the aforementioned beaver skins are now kept by the United States Marshall.

Third: That such libel of information is ambiguous and uncertain in that it can not be ascertained therefrom as to whether such skins are claimed to be forfeit because they are alleged to have been trapped unlawfully or because they are alleged to have been transported unlawfully inside of Katmai National Monument, or because they are alleged to have been transported unlawfully outside of such national monument, or because such skins were unlawfully possessed. Further, if such skins are claimed to be forfeited because they were unlawfully transported or because they were unlawfully possessed, [14] it does not set forth as to the nature of the unlawful possession or transportation.

Fourth: Such libel of information does not separately propound in distinct articles the matters relied upon as grounds of forfeiture.

Dated this sixteenth day of November, 1940.

VERNER ECKMAN and

ALEX KARVONEN,

By DAVIS & RENFREW

Attorneys-in-Fact and Attorneys
at Law for the above
Claimants, per

/s/ EDWARD V. DAVIS

Copy of these exceptions received November 22, 1940.

/s/ H. P. NOGGLE

[Endorsed]: Filed Nov. 22, 1940. [15]

[Title of District Court and Cause.]

ANSWER

Comes now Verner Eckman and Alex Karvonen, the owners of the above named beaver skins, and the claimants thereof, and make answer to the libel of information filed against such skins by Joseph W. Kehoe, as follows:

I.

Admit that Carlos M. Carson did on or about the 18th day of May, 1940, seize the above mentioned skins, but specifically deny that such seizure was made in said Carson's official capacity.

II.

Deny that such skins were turned over to the custody of James H. Patterson, United States Marshal for the Territory of Alaska, Third Division, or that such skins are now in the possession of such marshal, for the reason that defendants Eckman and Karvonen have no knowledge as to what was done with the skins after they were seized, and have no knowledge upon which to form any belief as to such matters, and thus they deny the same.

III.

Admit that such skins were at the time of their seizure in the possession of Vernon Eckman and Alex Karvonen. [16]

IV.

Deny specifically that such skins were possessed by Vernon Eckman and Alex Karvonen in violation of the Alaska Game Laws and the rules and regulations promulgated thereunder.

V.

Deny specifically that such beaver were taken and killed at and within Katmai National Monument, Third Division, Territory of Alaska.

VI.

Deny specifically that such beaver skins were possessed within Katmai National Monument.

VII.

Deny that said beaver skins were transported within Katmai National Monument.

VIII.

Deny that said beaver skins were unlawfully transported or possessed outside of the confines of such Katmai National Monument.

IX.

Deny specifically that such skins are forfeited for the reasons stated or for any reasons at all.

For a further answer, and by way of affirmative defense to the aforementioned libel of information,

Verner Eckman and Alex Karvonen allege as follows:

I.

That during the open Season on Beaver, and at a place where under the Alaska Game Laws and the regulations propounded thereunder it is legal to trap beaver, Verner Eckman and Alex Karvonen did trap the twenty beaver mentioned in the libel of information. That they transported such beaver skins to Naknek, Third Division, Territory of Alaska, and that thereupon such skins were wrongfully and unlawfully seized by one [17] Carlos Carson. That such skins are lawfully the property of Verner Eckman and Alex Karvonen, and that Verner Eckman and Alex Karvonen are entitled to have the said skins returned to them.

Further answering the allegations contained in such libel of information, and by way of affirmative defense thereto, Verner Eckman and Alex Karvonen, the owners and the claimants of said beaver skins alleges as follows:

That the unlawful taking and killing of said twenty beaver within Katmai National Monument, an area in which a continuous closed season exists on all land fur bearing animals and the alleged unlawful possession and transportation of such skins which are alleged in said libel of information and which are hereby answered, are the same alleged unlawful taking and killing of beaver within Katmai National Monument where a continuous closed season exists on all land fur bearing animals, and the same alleged unlawful possessions and

transportations of such skins, as are recited in a criminal information filed against Verner Eckman and Alex Karvonen by Carlos M. Carson, on the eighteenth day of May, 1940, before William B. Reagan, United States Commissioner for Naknek, Kvichak Precinct, Third Division, Territory of Alaska. That under such criminal information the United States of America appeared as plaintiff and Verner Eckman and Alex Karvonen appeared as defendants. That all of the alleged unlawful acts set forth in the libel of information herein were at issue under such criminal charge, and that all of the evidence which would be necessary to establish, and competent under the various assignments and charges of violation set out in the libel of information herein, would also be competent, and would tend to establish the allegations of such criminal information. That all the alleged unlawful matters alleged in the libel of information relate to the same subject-matter, and are based upon the same [18] transactions, as the various allegations in said criminal information. That at the time when said criminal information was made on the part of the United States of America and at the time when it was tried as hereinafter set forth, all of the facts which would be competent to sustain the allegations of plaintiff's libel herein were known to and within the possession of the representative of the United States of America who made the said information. That the charges in said criminal information contained the same charges in substance and effect, and are the same allegations of offenses and violations,

and are founded on the same sections of the statutes of the United States and the regulations thereunder, as the matters and things herein alleged in plaintiff's libel. Defendants further allege that all and singular of said matters were presented to the Court in the case of *United States of America vs. Verner Eckman and Alex Karvonen*, and were tried by such Court, and that the defendants *Verner Eckman and Alex Karvonen* were found not guilty of such charges, and the court rendered a judgment acquitting the defendants *Verner Eckman and Alex Karvonen* of such alleged violations alleged in said criminal information, and all of which alleged violations are the same violations now set out by plaintiff and answered by these defendants.

Wherefore claimants and defendants *Verner Eckman and Alex Karvonen* pray that the libel of information may be dismissed and the twenty beaver skins here in issue returned to defendants.

VERNER ECKMAN and

ALEX KARVONEN,

by their Attorneys in Fact,

DAVIS & RENFREW, per

/s/ EDWARD V. DAVIS

United States of America,

Territory of Alaska,

Third Division—ss.

Edward V. Davis, being first duly sworn, deposes and says: That he makes this verification for and on behalf of *Verner Eckman and Alex Karvonen*. That he is duly authorized to make this answer

and verification by such defendants *Verner Eckman* and That he makes this verification for the said *Verner Eckman* and *Alex Karvonen* for the reason that *Verner Eckman* and *Alex Karvonen* are not present at the place where this affidavit of verification is made, but are in fact in the interior of Alaska, at a place difficult of access during the winter time. That he has read the above and foregoing answer, knows the contents thereof, and that he believes the same to be true.

EDWARD V. DAVIS

Subscribed and sworn to before me this sixteenth day of November, 1940.

[Seal] /s/ MARY E. FASNACHT

Notary Public for Alaska

By commission expires 10/19/43.

[Endorsed]: Filed Jan. 25, 1941. [20]

[Title of District Court and Cause.]

MOTION

Comes now the above named defendants, *Vernon Eckman* and *Alex Karvonen*, by and through their attorneys, *Davis* and *Renfrew*, and move Exceptions to Plaintiff's Libel filed by such defendants may be withdrawn, and that defendants' Answer presented herewith be filed in the above entitled cause.

This motion is based upon the fact that *J. W. Kehoe*, United States Attorney, and *Davis* and *Ren-*

frew, attorneys for the defendants, have agreed upon the points raised by defendants' exceptions.

Dated, this 21st day of January, 1941.

DAVIS & RENFREW

Attorneys for Defendants,

By /s/ EDWARD V. DAVIS

[Endorsed]: Filed Jan. 25, 1941. [21]

[Title of District Court and Cause.]

DEMURRER

Comes now Joseph K. Kehoe, United States Attorney for the Third Division of the Territory of Alaska, and demurs to the allegation of paragraph one of defendants' further Answer and affirmative defense and the whole thereof, on the grounds that the same does not state facts sufficient to constitute a defense to said action.

/s/ JOSEPH W. KEHOE

United States Attorney

[Endorsed]: Filed April 7, 1941. [22]

[Title of District Court and Cause.]

M. O. OF CONTINUANCE

Now at this time, on the reading of the calendar, the plaintiff being represented by Noel K. Wennblom, United States Attorney, the claimants being represented by William W. Renfrew, Esq.,

It Is Ordered that the cause be, and it hereby is, continued for thirty days.

Entered Court Journal No. G 4, Page No. 337,
Aug. 17, 1942. [23]

[Title of District Court and Cause.]

M. O. SETTING CAUSE FOR TRIAL

Now at this time, on motion of William W. Renfrew, Esq., of counsel for defendants in the above-entitled cause, J. Gerald Williams, Assistant United State Attorney, consenting thereto,

It Is Ordered that the above-entitled cause be, and it hereby is, set for trial to follow the trial of cause No. A-2821, entitled Felix Nekutis, Plaintiff, vs. Evan Jones Coal Company, a corporation, Defendant.

Entered Court Journal No. G 6, Page No. 203,
May 3, 1943. [24]

[Title of District Court and Cause.]

HEARING ON DEMURRER TO DEFENDANTS' ANSWER

Now at this time came J. Gerald Williams, Assistant United States Attorney, for and in behalf of the Government, came also Edward V. Davis and William W. Renfrew, Esqs., for and in behalf of the defendants, for hearing on demurrer to defendants' answer.

Argument to the Court was had by J. Gerald Williams, Assistant United States Attorney, for and in behalf of the Government.

Argument to the Court was had by Edward V. Davis, Esq., for and in behalf of the defendants.

Whereupon the Court, being fully and duly advised in the premises, took the matter under advisement.

Entered Court Journal No. G 6, Page 206, May 3, 1943. [25]

[Title of District Court and Cause.]

M. O. OVERRULING DEMURRER TO
DEFENDANTS' ANSWER

Now at this time came J. Gerald Williams, Assistant United States Attorney, for and in behalf of the Government, and this cause having heretofore and on the 3rd day of May, 1943, come on for hearing on plaintiff's demurrer to defendants' answer, and the Court having taken the matter under advisement, and being fully and duly advised in the premises, now gives its oral decision, and

It Is Ordered that plaintiff's demurrer to defendants' answer be, and it hereby is, overruled, and plaintiff be, and hereby is, given thirty days to reply.

Entered Court Journal No. G 6, Page No. 222, May 5, 1943. [26]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE
PLEADINGS

Comes now Davis & Renfrew, Attorneys for Vernon Eckman and Alex Karvonen, defendants, and move for Judgment in favor of the defendants upon the pleadings, and that plaintiff's Libel of Information may be dismissed, and the twenty beaver skins at issue in this action may be ordered to be returned to the defendants according to the Prayer of defendants Answer.

This Motion is based upon the fact that a Demurrer was filed to defendants' further Answer and affirmative defense by J. W. Kehoe, United States Attorney, for and on behalf of the United States of America, plaintiff, and that such Demurrer was argued on the third day of May, 1943, and that the same was overruled by the Court on the fifth day of May, 1943, and the plaintiff was given thirty days to reply to defendants' Answer. That more than thirty days have elapsed since the said fifth day of May, 1943, and that no reply has been made to the affirmative matter set up in defendants' Answer, all as will more fully appear from the records and files of this action.

Dated this 10th day of July, 1943.

DAVIS & RENFREW

Attorneys for Defendants

By /s/ EDWARD V. DAVIS

Copy received this 10th day of July, 1943.

NOEL K. WENNBLOM

United States Attorney

By /s/ M. PEDERSEN

[Endorsed]: Filed July 10, 1943. [27]

[Title of District Court and Cause.]

MOTION

Comes now Noel K. Wennblom, United States Attorney for the Third Division of the Territory of Alaska, and moves this Honorable Court for leave to file herein a demurrer to the second affirmative defense set forth in the answer of said defendants, upon the grounds that said second affirmative defense does not state facts sufficient to constitute a defense to said action.

Dated this 16th day of December, 1943.

/s/ NOEL K. WENNBLOM

United States Attorney

Service of a copy of the above motion hereby acknowledged this 16th day of December, 1943.

DAVIS & RENFREW

Attorney for Defendants

/s/ M. FASNACHT

[Endorsed]: Filed Dec. 17, 1943. [28]

[Title of District Court and Cause.]

ORDER

This matter having come on this day before the court upon the motion of the United States of America, the plaintiff herein made by and through Noel K. Wennblom, United States Attorney, for leave to file herein a demurrer to the second affirmative defense set forth in the answer of said defendants now on file herein, upon the grounds and for the reason that said second affirmative defense does not state facts sufficient to constitute a defense to said action, and good cause appearing therefor,

It Is, Therefore, Ordered that the plaintiff be and he is hereby granted leave to file such a demurrer.

/s/ SIMON HELLENTHAL
District Judge

Service of a copy of the above order hereby acknowledged this 17th day of December, 1943.

/s/ W. RENFREW
Attorney for Defendants

Entered Court Journal No. G-7, Page No. 389,
Dec. 17, 1943.

[Endorsed]: Filed Dec. 17, 1943. [29]

[Title of District Court and Cause.]

DEMURRER

Comes now Noel K. Wennblom, United States Attorney for the Third Division of the Territory of Alaska, and demurs to the second affirmative defense set forth in the answer of the defendants now on file herein, and the whole thereof, on the grounds and for the reason that the same does not state facts sufficient to constitute a defense to said action.

/s/ NOEL K. WENNBLOM

United States Attorney

Service of a copy of the above demurrer hereby acknowledged this 16th day of December, 1943.

DAVIS & RENFREW

Attorney for Defendants

/s/ M. FASNACHT

[Endorsed]: Filed Dec. 17, 1943. [30]

[Title of District Court and Cause.]

M. O. SETTING TIME FOR HEARING
ON DEMURRER

Now at this time on the Court's own motion, the plaintiff being represented by Raymond E. Plummer, Assistant United States Attorney, the defendants being represented by Davis & Renfrew;

It Is Ordered, that the demurrer to the second affirmative defense in defendants' Answer in Cause No. V-2370 entitled United States of America, plaintiff, vs. 20 Beaver Skins and Vernon Eckman

and Alex Karvonen, defendants, be and is hereby, set for hearing at 10:00 o'clock A.M. of Wednesday, October 11, 1944.

Entered Court Journal No. G-9, Page No. 97, Oct. 9, 1944. [31]

[Title of District Court and Cause.]

HEARING ON DEMURRER

Now at this time came Raymond E. Plummer, Assistant United States Attorney, for and in behalf of the Government, came also Edward V. Davis, Esq., of counsel for the defendants, in Cause No. V-2370 entitled United States of America, plaintiff, vs. 20 Beaver Skins and Vernon Eckman and Alex Karvonen, defendants, and the hearing on the demurrer to the second affirmative defense in defendants' Answer was had.

Whereupon, after hearing the arguments of the respective counsel, the Court took the matter under advisement.

Entered Court Journal No. G 9, Page No. 17, Oct. 11, 1944. [32]

[Title of District Court and Cause.]

M. O. RENDERING DECISION

Now at this time came Raymond E. Plummer, Assistant United States Attorney, for and in behalf of the Government, came also Edward V.

Davis, Esq., of counsel for the defendants in Cause No. V-2370 entitled United States of America, plaintiff, vs. 20 Beaver Skins and Vernon Eckman and Alex Karvonen, defendants, and the Court having heretofore and on the 11th day of October, 1944 heard argument of respective counsel on the demurrer to the second affirmative defense in defendants' Answer, and at this time being fully and duly advised in the premises overruled the demurrer with reservations until trial of cause.

Entered Court Journal No. G 9, Page No. 128, Oct. 13, 1944. [33]

United States District Court, Third Division,
Territory of Alaska

No. V-2370, Civil

THE UNITED STATES OF AMERICA

vs.

20 BEAVER SKINS and VERNON ECKMAN
and ALEX KARVONEN

PRAECIPE FOR SUBPOENA ON BEHALF
OF UNITED STATES

The Clerk of said Court will issue Subpoena for the following-named persons to appear before said Court, at the United States Court Rooms, in Anchorage, at ten o'clock A.M., on the 6th day of November, 1944, then and there to testify in behalf of the United States:

Ernest Allen, Naknek, Alaska.

Charlie Anderson, Naknek, Alaska.

Annie Anderson, Anchorage, Alaska.

C. M. Carson, Dillingham, Alaska.

This 4th day of November, 1944.

Subpoena issued: November 4, 1944.

/s/ RAYMOND E. PLUMMER

Assistant United States Atty.

[Endorsed]: Filed Nov. 4, 1944. [34]

[Title of District Court and Cause.]

M. O. OF DISMISSAL

Now at this time, on the Court's own motion, Noel K. Wennblom, United States Attorney, being present and objecting thereto, to which objection an exception was granted;

It Is Ordered, that Cause No. V-2370 entitled United States of America, plaintiff, vs. 20 Beavers Skins and Vernon Eckman and Alex Karvonen, defendants, be, and the same is hereby dismissed.

Entered Court Journal No. G 9, Page No. 272, Nov. 16, 1944.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court, and to Vernon Eckman and Alex Karvonen, and their at-

torneys, Edward V. Davis, Esquire, and William W. Renfrew, Esquire:

Take notice that the plaintiff in the above entitled action hereby appeals to the United States Circuit Court of Appeals, Ninth Circuit, from the final minute order made and entered in said cause on the 16th day of November, 1944, by the District Court for the Territory of Alaska, Third Division, dismissing said cause in favor of the defendants and against the plaintiff, and from the whole of said final minute order.

Dated this 15th day of February, 1945.

/s/ NOEL K. WENNBLOM

United States Attorney

Attorney for Plaintiff-

Appellant

Service acknowledged by receipt of a copy of the above and foregoing Notice of Appeal this 13th day of February, 1945.

/s/ EDWARD V. DAVIS

Attorney for Defendants.

[Endorsed]: Filed Feb. 15, 1945. [36]

[Title of District Court and Cause.]

PETITION FOR APPEAL

Comes now the plaintiff, the United States of America, by Noel K. Wennblom, United States Attorney, Third Division, Territory of Alaska, and feeling itself aggrieved by that certain final minute

order, entered in the above entitled cause on the 16th day of November, 1944, wherein said cause was dismissed, prays an appeal therefrom, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, the particulars, wherein it considers said final order erroneous, are set forth in the assignment of errors which is filed herewith and to which reference is hereby made.

Wherefore, the premises considered, your petitioner prays that an appeal in its behalf in the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of and herewith duly assigned, be allowed and granted and that a transcript of the records, papers and documents upon which the final order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and petitioner prays a reversal of said final minute order. [37]

Dated at Seward, Alaska, this 15th day of February, 1945.

/s/ NOEL K. WENNBLOM

United States Attorney, Anchorage, Alaska, Attorney for Plaintiff-Appellant.

Receipt of copy acknowledged this 13th day of February, 1945.

/s/ EDWARD V. DAVIS

Attorney for Defendants.

[Endorsed]: Filed Feb. 15, 1945. [38]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the plaintiff, The United States of America, by Noel K. Wennblom, United States Attorney, Third Division, Territory of Alaska, and in connection with its petition of appeal, file the following assignment of errors, on which it will rely on its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final minute order entered in the above entitled Court and cause on the 16th day of November, 1944, dismissing said cause.

I.

The Court erred in dismissing said cause for the reason that said dismissal was contrary to law.

II.

The Court erred in making and ordering entered its minute order on the 16th day of November, 1944, dismissing said cause, for the reason that the same is contrary to law.

III.

The Court erred in making and entering its order on the 5th day of May, 1943, overruling the demurrer to the allegations of paragraph one (1) of defendants further answer and affirmative defense, and the whole thereof, which demurrer was filed in said cause on the 7th day of April, 1941, by the [39] plaintiff, for the reason that said order is contrary to law.

IV.

The Court erred in overruling the demurrer to the allegations of paragraph one (1) of defendants further answer and affirmative defense, and the whole thereof, which demurrer was filed in said cause on the 7th day of April, 1941, by the plaintiff, for the reason that the same is contrary to law.

V.

The Court erred in making and entering its order on the 13th day of October, 1944, overruling the demurrer to the second affirmative defense set forth in the answer of the defendants, and the whole thereof, which demurrer was filed in said cause on the 17th day of December, 1943, by the plaintiff, for the reason that said order is contrary to law.

VI.

The Court erred in overruling the demurrer to the second affirmative defense, set forth in the answer of the defendants, and the whole thereof, which demurrer was filed in said cause on the 17th day of December, 1943, by the plaintiff, for the reason that the same is contrary to law.

Dated at Seward, Alaska, this 15th day of February, 1945.

/s/ NOEL K. WENNBLOM

United States Attorney, Anchorage, Alaska, Attorney for Plaintiff-Appellant.

Receipt of a copy acknowledged this 13th day of February, 1945.

/s/ EDWARD V. DAVIS

Attorney for Defendants.

[Endorsed]: Filed Feb. 15, 1945. [40]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

On this day came the United States of America, the plaintiff in the above entitled cause, and presented its petition for an appeal, and an assignment of errors accompanying the same, which petition, upon consideration by the Court is hereby allowed.

And, It Is Hereby Ordered by the Court that the appeal prayed for be, and the same is hereby allowed and granted to the United States Circuit Court of Appeals for the Ninth Circuit from the final minute order, and the whole thereof, made and entered in the above entitled Court and cause on the 16th day of November, 1944, dismissing said cause.

Done by the Court and entered order at Seward, Alaska, this 15th day of February, 1945.

/s/ ANTHONY J. DIMOND

District Judge

Receipt of copy is hereby acknowledged this 13th day of February, 1945.

/s/ EDWARD V. DAVIS

Attorney for Defendants.

[Endorsed]: Filed Feb. 15, 1945.

Entered Court Journal No. G 9, Page No. 532,
Feb. 15, 1945. [41]

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Defendants, Vernon Eckman and Alex Karvonen, and their attorneys, Edward V. Davis, Esquire, and William W. Renfrew, Esquire:

You, and each of you, are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, California, in said Circuit, within forty (40) days from the date hereof, pursuant to an order allowing an appeal, duly entered in the Clerk's office in the District Court for the Territory of Alaska, Third Division, at Anchorage, Alaska, in that certain action wherein The United States of America is plaintiff and you are defendants, as above entitled and wherein the said United States of America, is appellant to show cause, if any there be, why the final minute order, and the whole thereof entered therein on the 16th day of November, 1944, ordering that said cause be dismissed, should not be reversed and corrected and why a

speedy justice should not be done to appellant, the said United States of America.

Witness the Honorable Anthony J. Dimond, Judge for the District Court for the Territory of Alaska, Third Division, [42] and the seal of said Court hereunto affixed this 15th day of February, 1945.

[Seal] /s/ ANTHONY J. DIMOND
Judge of the District Court for the Territory of
Alaska

Attest:

 /s/ A. M. THOMAS
 Chief Deputy Clerk of said
 Court

Service of the foregoing Citation on Appeal by receipt of copy thereof acknowledged this 19th day of February, 1945.

 /s/ EDWARD V. DAVIS
 Attorney for Defendants

[Endorsed]: Filed Feb. 15, 1945.

Entered Court Journal No. G 9, Page No. 532,
Feb. 15, 1945. [43]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court, Territory of
Alaska, Third Division:

You will please make, certify, and transmit, at
the expiration of ten (10) days from the date

hereof, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a true copy of all of the following indicated portions of the record in the above entitled cause, as the transcript to be used on the appeal of the plaintiff, The United States of America, from the final minute order dismissing said cause, made and entered in said cause on the 16th day of November, 1944, to wit:

1. Libel of Information.
2. Order for Issuance of Monition and Service of Notice.
3. Monition.
4. Affidavit of Edward V. Davis (filed October 14, 1940).
5. Motion for Continuance (filed October 14, 1940).
6. Claim of Property (filed November 15, 1940).
7. Exceptions to Libel (filed November 16, 1940).
8. Answer.
9. Motion to Withdraw Exceptions (filed January 25, 1941). [44]
10. Demurrer (filed April 7, 1941).
11. Minute Order of Continuance (entered August 17, 1942).
12. Minute Order Setting Cause for Trial (entered May 3, 1943).
13. Journal Entry re Hearing on Demurrer to Defendant's Answer (entered May 3, 1943).
14. Minute Order Overruling Demurrer to Defendants' Answer (entered May 5, 1943).
15. Motion for Judgment on the Pleadings.

16. Motion for Leave to File Demurrer (filed December 17, 1943).

17. Order Granting Leave to File Demurrer.

18. Demurrer (filed December 17, 1943).

19. Minute Order Setting Time for Hearing on Demurrer (entered October 9, 1944).

20. Journal Entry re Hearing on Demurrer (entered October 11, 1944).

21. Minute Order Rendering Decision (entered October 13, 1944).

22. Praecipe (filed November 4, 1944).

23. Minute Order of Dismissal (entered November 16, 1944).

24. Notice of Appeal.

25. Petition for Appeal.

26. Assignment of Errors.

27. Citation on Appeal.

28. This Praecipe.

Dated this 10th day of February, 1945.

/s/ NOEL K. WENNBLOM

United States Attorney, Anchorage, Alaska, Attorney for Plaintiff-Appellant. [45]

Service acknowledged by receipt of a copy of the above and foregoing Praecipe this 19th day of February, 1945.

/s/ EDWARD V. DAVIS

Attorney for Defendants.

[Endorsed]: Filed Feb. 19, 1945. [46]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
Territory of Alaska,
Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 46 pages, numbered from 1 to 46, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipe filed in my office on the 19th day of February, 1945; that the foregoing transcript has been prepared, examined and certified to by me.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court this 2nd day of March, 1945.

[Seal] M. E. S. BRUNELLE

Clerk of the District Court, Territory of Alaska,
Third Division.

[Endorsed]: No. 11014. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Vernon Eckman and Alex Karvonen, Appellees. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Third Division.

Filed March 21, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11016

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

EAST ST. JOHNS SHINGLE CO., INC., a Cor-
poration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

OCT 7 1945

PAUL P. O'BRIEN,
CLERK

No. 11016

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

EAST ST. JOHNS SHINGLE CO., INC., a Cor-
poration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer, Amended	9
Appeal:	
Certificate of Clerk to Transcript of Record on	22
Designation of Record on (CCA).....	34
Designation of Record on (DC).....	21
Notice of	20
Order to Forward Exhibits on.....	21
Statement of Points on	33
Certificate of Clerk to Transcript of Record on Appeal	22
Complaint	2
Exhibits A, B, C—Statements of Overcharges	6
Designation of Record on Appeal (CCA).....	34
Designation of Record on Appeal (DC).....	21
Findings of Fact, Conclusions of Law and Judgment	18
Memo of Decision	17
Names and Addresses of Attorneys of Record	1

Notice of Appeal	20
Order Denying Motion for Supplemental Find- ings of Fact	19
Order to Forward Exhibits	21
Statement of Points on Appeal.....	33
Trial Proceedings	24
Exhibit for Plaintiff:	
5—Revised General Order	29
Witness for Plaintiff:	
Johnson, W. F.	
—direct	25

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

JEROME S. BISCHOFF, NORMAN T. J. McCaffery, F. E. WAGNER,

Bedell Building, Portland, Oregon.

W. DUNLAP CANNON JR.,

1355 Market St., San Francisco,

For Appellant.

JAMES ARTHUR POWERS,

American Bank Building, Portland,

For Appellee.

United States District Court for the District
of Oregon.

Civil No. 2502

CHESTER BOWLES, Administrator
Office of Price Administration

Plaintiff

v.

EAST ST. JOHNS SHINGLE CO., INC. a
corporation

Defendant

COMPLAINT

FIRST CAUSE OF ACTION

Comes now the plaintiff above named and
alleges:

I.

That plaintiff, as Administrator of the Office of Price Administration brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. L. No. 421, 77th Cong., 2d Sess., 56 Stat. 23) enacted January 30, 1942, hereinafter called "the Act."

II.

That defendant is a corporation existing under and by virtue of the laws of the State of Oregon.

III.

That jurisdiction of the action is conferred upon

this court by Section 205(c) of the Act and by said Section 205(e) of the Act.

IV.

That at all times hereinafter mentioned, there has been in effect pursuant to the Act, Maximum Price Regulation 164—Red Cedar Shingles, as amended (7 Fed. Reg. 971) establishing a maximum price for direct mill sales of red cedar shingles.

V.

That from and including the 30th day of June 1943, more than six months after the date of approval and enactment of the Act, to and including the [1*] date of the filing of this complaint, the defendant, a manufacturer of red cedar shingles at Portland, Oregon, sold and delivered carloads of red cedar undercourse shingles to numerous wholesalers, distribution yards and other purchasers. That all of said purchases were made in the course of trade. That defendant demanded and received a price or consideration for each such carload of red cedar shingles in excess of the maximum price established by Maximum Price Regulation 164, as set forth in Exhibit A attached hereto and made a part of this complaint.

VI.

That three times the aggregate amount by which the prices charged and received by the defendant referred to in Paragraph V above exceeded the

*Page numbering appearing at foot of page of original certified Transcript of Record.

maximum prices provided by Maximum Price Regulation 164 equals \$1,414.74.

SECOND CAUSE OF ACTION

I.

Plaintiff realleges Paragraphs I, II, III and IV of the First Cause of Action.

II.

That from and including the 30th day of June 1943, more than six months after the date of approval and enactment of the Act, to and including the date of the filing of this complaint, the defendant, a manufacturer of red cedar shingles at Portland, Oregon, sold and delivered carloads of red cedar shingles to numerous wholesalers, distribution yards, and other purchasers. That all of said purchases were made in the course of trade. That defendant demanded and received a price or consideration for each said carload of red cedar shingles in excess of the maximum price established by Maximum Price Regulation 164, as set forth in Exhibit B attached hereto and made a part of this complaint, in that the defendant charged and caused the buyers to pay, in addition to the ceiling price, transportation expenses not permitted by Maximum Price Regulation 164.

III.

That three times the aggregate amount by which the prices charged and received by the defendant referred to in Paragraph II above exceeded the [2]

maximum prices provided by Maximum Price Regulation 164, equals \$3,980.25.

THIRD CAUSE OF ACTION

I.

Plaintiff realleges Paragraphs I, II, III and IV of the First Cause of Action.

II.

That from and including the 30th day of June 1943, more than six months after the date of approval and enactment of the Act, to and including the date of the filing of this complaint, the defendant, a manufacturer of red cedar shingles at Portland, Oregon, sold and delivered carloads of red cedar shingles to numerous wholesalers, distribution yards, and other purchasers. That all of said purchases were made in the course of trade. That defendant demanded and received a price or consideration for each said carload of red cedar shingles in excess of the maximum price established by Maximum Price Regulation 164, as set forth in Exhibit C attached hereto and made a part of this complaint, in that the defendant failed to grant the cash discount customarily allowed by the defendant in October 1941, as required by Maximum Price Regulation 164.

III.

That three times the aggregate amount by which the price charged and received by the defendant referred to in Paragraph II above exceeded the maximum prices provided by Maximum Price Regulation 164, equals \$1,397.43.

Wherefore plaintiff demandes judgment on behalf of the United States against the defendant in the sum of \$6,792.42.

Dated this 26th day of June, 1944.

/s/ JEROME S. BISCHOFF

of Attorneys for the Plaintiff

/s/ NORMAN T. J. McCAFFERY

of Attorneys for the Plaintiff

State of Oregon

County of Multnomah—ss.

I, Jerome S. Bischoff one of the attorneys for Plaintiff do hereby certify that I have prepared the foregoing copy of Complaint and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the...day of June, 1944.

Attorney for Plaintiff

[Endorsed]: Filed June 26, 1944. [3]

EXHIBIT A

Date	Customer	Car Number	Amount of Overcharge (Straight Overcharge)
8/14/43	Richardson Lumber Co.	NP 33565	\$ 3.75
10/ 4/43	Coates-Hoppe Lumber Co.	PENN 100682	72.06
10/ 7/43	W. F. Hoppe	WLE 25240	69.50
10/25/43	Millikan Bros.	PM 82604	62.50
11/10/43	Millikan Bros.	ATSN 134532	65.00
11/11/43	Farmers Union Stock Coop.	CB&Q 120793	85.60
11/13/43	West Lumber & Coal Co.	Milw 20845	40.05
12/10/43	P. J. Bryne & Son	SL&SF 14581	73.12
Total.....			\$471.58

EXHIBIT B

Date	Customer	Car Number	Amount of Overcharge (Truck. Costs)
6/30/43	Kay Bee Shingle Co. Inc.	ACY 1177	25.00
7/ 1/43	Griswold Lumber Co.	GTW 42219	25.00
7/ 3/43	Kay Bee Shingle Co., Inc.	WAB 86352	25.00
7/ 3/43	Mead Lumber & Coal Co.	IC 12870	25.00
7/ 6/43	Kay Bee Shingle Co., Inc.	MC 86516	31.20
1/ 7/43	West Lumber & Coal Co.	MP 93432	25.00
7/12/43	Shelton Lumber Co.	ACL 56577	25.00
7/12/44	Kay Bee Shingle Co., Inc.	DIT 17598	25.00
7/13/43	Carhart Lumber Company	NYC 152574	25.00
7/16/43	Drake Lumber Co.	NYC 155266	25.00
7/17/43	A. W. Stickle & Co.	NYC 205676	25.00
7/19/43	Carhart Lumber Co.	Milw 713079	25.00
7/24/43	A. W. Stickle & Co.	NKP 22051	25.00
7/24/43	Ward Lewis Lumber Co.		25.00
7/26/43	Carhart Lumber Co.	DRGW 67099	26.70
7/27/43	A. W. Stickle & Co.	MP 41063	25.00
7/30/43	Carhart Lumber Co.	CYW 71650	26.50
7/31/43	Carhart Lumber Co.	B&O 173700	27.00
8/ 2/43	Kay Bee Shingle Co., Inc.	PM 84208	25.00
8/ 3/43	Harberg Lumber Company	NP 7118	25.00
8/ 4/43	Kay Bee Shingle Co., Inc.	CBQ 44933	25.00
8/ 5/43	W. C. Smith	NP 26040	25.00
8/12/43	Williams Lumber Co.	Milw 595133	25.00
8/14/43	Richardson Lumber Co.	NP 33565	25.00
8/16/43	Calloway Lumber & Coal Co.	Erie 86245	23.70
8/19/43	Kay Bee Shingle Co., Inc.	GMO 24093	23.70
8/24/43	Kay Bee Shingle Co., Inc.	CNW 73574	25.00
8/25/43	Kay Bee Shingle Co., Inc.	NP 32154	25.00
8/26/43	Kay Bee Shingle Co., Inc.	LV 75978	26.70
8/28/43	Kay Bee Shingle Co., Inc.	SP 62092	25.00
9/ 2/43	Griswold Lumber Co.	WAB 83704	23.60
9/22/43	Evans Products Co.	GN 45962	28.50
9/23/43	Smith Hoffman & Wright Co.	TNO 39882	25.00
10/ 4/43	Coates Hoppe Lumber Co.	PENN 100682	28.85
10/ 7/43	W. F. Hoppe	WLE 25240	27.80
10/ 9/43	Smith Hoffman & Wright Co.	WAB 78942	29.30
10/18/43	Griswold Lumber Co.	SOO 32794	24.00
10/25/43	Millikan Bros.	PM 82604	25.00
10/26/43	Smith Hoffman & Wright Co.	NP 32847	25.00

Date	Customer	Car Number	Amount of Overcharge (Truck. Costs)
10/27/43	Marshall Shingle Co.	PENN 43317	26.70
11/ 2/43	Kay Bee Shingle Co., Inc.	TNO 58238	12.50
11/ 3/43	Kay Bee Shingle Co., Inc.	NP 18780	28.60
11/ 3/43	Redwood Manufacturers Co.	WAB 48566	24.65
11/ 3/43	Smith Hoffman & Wright Co.	NP 33025	25.00
11/10/43	Millikan Bros.	ATSN 134532	26.00
11/11/43	Farmers Union Stock Coop.	CB&Q 120793	28.30
11/13/43	West Lumber & Coal Co.	Milw 20845	26.70
12/ 1/43	Marshall Shingle Co.	Milw 592046	25.00
12/ 8/43	Kay Bee Shingle Co., Inc.	SP 26753	25.00
12/10/43	P. J. Bryne & Son	SL&SF 14581	29.25
12/21/43	Reilly Atkinson & Co., Inc.	PENN 571474	26.50
12/23/43	Marshall Shingle Co.	NP 33726	25.00

Total.....\$1,326.75

EXHIBIT C

Date	Customer	Car Number	Amount of Overcharge (Cash Discts.)
7/ 7/43	West Lumber & Coal Co.	MP 93432	\$13.74
7/12/43	Shelton Lumber Co.	ACL 56577	13.75
7/22/43	Indiana Farm Bu. Coop, Assn.	SL&SF 163741	18.12
8/ 3/43	Harberg Lumber Co.	NP 7118	18.70
8/ 5/43	W. C. Smith	NP 26040	19.73
8/12/43	Williams Lumber Co.	Milw 595133	17.75
8/14/43	Richardson Lumber Co.	NP 33565	16.87
9/ 2/43	Griswold Lumber Co.	WAB 83704	16.87
9/13/43	Van Pelton Lumber Co. (Inv. No. 14056-14060)		7.40
9/23/43	Smith Hoffman & Wright Co.	TNO 39882	16.25
10/ 4/43	Coates-Hoppe Lumber Co.	PENN 100682	13.55
10/ 7/43	W. F. Hoppe	WLE 25240	13.07
10/ 9/43	Smith Hoffman & Wright Co.	WAB 78942	19.04
10/18/43	Griswold Lumber Co.	SOO 32794	17.47
10/25/43	Millikan Bros.	PM 82604	11.75
10/26/43	Smith Hoffman & Wright Co.	NP 32847	16.25
10/27/43	Marshall Shingle Co.	PENN 43317	21.53
11/ 2/43	Kay Bee Shingle Co., Inc.	TNO 58238	13.93
11/ 3/43	Kay Bee Shingle Co., Inc.	NP 18780	11.44
11/ 3/43	Smith Hoffman & Wright Co.	NP 33025	17.50

Date	Customer	Car Number	Amount of Overcharge (Cash Discts.)
11/ 3/43	Redwood Manufacturers Co.	WAB 48566	17.49
11/10/43	Millikan Bros.	ATSN 134532	12.22
11/11/43	Farmers Union Stock Coop.	CB&Q 120793	15.33
11/12/43	Smith Hoffman & Wright Co.	NP 32197	16.99
11/13/43	West Lumber & Coal Co.	Milw. 20845	12.00
12/ 1/43	Marshall Shingle Co.	Milw. 592046	21.75
12/ 8/43	Kay Bee Shingle Co., Inc.	SP 26753	18.77
12/21/43	Reilly Atkinson & Co.	PENN 571474	18.30
12/23/43	Marshall Shingle Co.	NP 33726	18.35
Total.....			\$465.81

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the Defendant and upon permission being granted by the Court during the Pretrial herein files this amended answer.

For Answer to Plaintiff's First Cause of Action, Defendant Admits, Denies and Alleges:

FIRST DEFENSE

That the First Cause of Action in said Complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND DEFENSE

That this alleged cause of action cannot be maintained and should be dismissed because it has been stated in open court that the complaint was filed at the instigation of Mr. Jerome Bischoff and Mr.

Norman T. J. McCaffery, Regional Enforcement Attorney of the OPA and the District Enforcement Attorney for the OPA, respectively, and there being no delegation of authority shown in the complaint, or otherwise, these two individuals have no authority to maintain the within action; and furthermore, that under the OPA Law, the authority indiscriminately to have subpoenas issued and actions commenced cannot be delegated for the reason that the plaintiff is the one that is authorized by law to maintain actions, and plaintiff is not authorized by law to delegate his discretionary power to the individuals mentioned above; and further, that it appears that the within action was brought without any specific authorization from the plaintiff and without the exercise of any discretion on the part of the plaintiff, but instead upon the sole discretion of the enforcement attorneys referred [8] to above; and for the further reason that the enforcement attorneys referred to above, in exercising unauthorized discretionary authority in bringing the within action, with respect to the First Cause of Action in the within complaint places a different interpretation upon the regulation in question than is placed upon it by the official interpretation from Washington, D. C.

THIRD DEFENSE

Denies that the Plaintiff has the right to maintain the First Cause of Action in said Complaint under the provisions of the law and regulations referred to therein.

FOURTH DEFENSE

That the Defendant in carrying on the transactions referred to in said First Cause of Action did so in good faith, and without any intent to violate any of the rules or regulations of the Office of Price Administration, and in carrying out said transactions, followed the practice which was in existence and established at Defendant's place of business prior to the time the various rules and regulations of the Office of Price Administration were put into effect, and there was no intention, willful or otherwise, on the part of this Defendant, to violate any ceiling prices as alleged, and denies any violation thereof.

FIFTH DEFENSE

That the Defendant is not liable for damages as claimed in the within action, as anything done or omitted to be done respecting same was done in good faith by the defendant and pursuant to the provisions of the Emergency Price Control Act of 1942, and the defendant in doing what it did and in omitting to do any of the things complained of did so in good faith and exercised all practicable diligence under the circumstances to comply with the provisions of said law.

For Answer to Plaintiff's Second Cause of Action, Defendant Admits, Denies and Alleges as follows:

FIRST DEFENSE [9]

That the Second Cause of Action in said Complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND DEFENSE

That this alleged cause of action cannot be maintained and should be dismissed because it has been stated in open court that the complaint was filed at the instigation of Mr. Jerome Bischoff and Mr. Norman T. J. McCaffery, Regional Enforcement Attorney of the OPA and District Enforcement Attorney for the OPA, respectively, and there being no delegation of authority shown in the complaint, or otherwise, these two individuals have no authority to maintain the within action; and furthermore, that under the OPA Law, the authority indiscriminately to have subpoenas issued and actions commenced cannot be delegated for the reason that the plaintiff is the one that is authorized by law to maintain actions, and plaintiff is not authorized by law to delegate his discretionary power to the individuals mentioned above; and further, that it appears that the within action was brought without any specific authorization from the plaintiff and without the exercise of any discretion on the part of the plaintiff, but instead upon the sole discretion of the enforcement attorneys referred to above; and for the further reason that the enforcement attorneys referred to above, in exercising unauthorized discretionary authority in

bringing the within action, with respect to the Second Cause of Action in the within complaint, places a different interpretation upon the regulation in question than is placed upon it by the official interpretation from Washington, D. C.

THIRD DEFENSE

Denies that the Plaintiff has the right to maintain the Second Cause of Action in said Complaint under the provisions of the law and regulations referred to therein.

FOURTH DEFENSE

That the Defendant in carrying on the transactions referred to in said Second Cause of Action did so in good faith, and without any intent to violate any of the rules or regulations of the Office [10] of Price Administration, and in carrying out said transactions, acted upon representations that the manner in which they were being handled was approved by the Office of Price Administration, and this Defendant, immediately upon receiving conflicting and contrary advice from the Office of Price Administration, ceased and discontinued the practice complained of, and this Defendant, at no time, intentionally or otherwise, violated the ceiling price in the sale of the red cedar shingles referred to.

FIFTH DEFENSE

That the Defendant is not liable for damages as claimed in the within action, as anything done or

omitted to be done respecting same was done in good faith by the Defendant and pursuant to the provisions of the Emergency Price Control Act of 1942, and the defendant in doing what it did and in omitting to do any of the things complained of did so in good faith and exercised all practicable diligence under the circumstances to comply with the provisions of said law.

For Answer to Plaintiff's Third Cause of Action, Defendant Admits, Denies and Alleges as Follows:

FIRST DEFENSE

That the Third Cause of Action in said Complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND DEFENSE

That this alleged cause of action cannot be maintained and should be dismissed because it has been stated in open court that the complaint was filed at the instigation of Mr. Jerome Bischoff and Mr. Norman T. J. McCaffery, Regional Enforcement Attorney of the OPA and District Enforcement Attorney for the OPA, respectively, and there being no delegation of authority shown in the complaint, or otherwise, these two individuals have no authority to maintain the within action; and furthermore, that under the OPA law, the authority indiscriminately to have subpoenas issued and actions commenced cannot be [11] delegated for the reason that the plaintiff is the one that is author-

ized by law to maintain actions, and plaintiff is not authorized by law to delegate his discretionary power to the individuals mentioned above; and further, that it appears that the within action was brought without any specific authorization from the plaintiff and without the exercise of any discretion on the part of the plaintiff, but instead upon the sole discretion of the enforcement attorneys referred to above; and for the further reason that the enforcement attorneys referred to above, in exercising unauthorized discretionary authority in bringing the within action, with respect to the Third Cause of Action in the within complaint, places a different interpretation upon the regulation in question than is placed upon it by the official interpretation from Washington, D. C.

THIRD DEFENSE

Denies that the plaintiff has the right to maintain the Third Cause of Action in said Complaint under the provisions of the law and regulations referred to therein.

FOURTH DEFENSE

That the Defendant in carrying on the transactions referred to in said Third Cause of Action did so in good faith, and without any intent to violate any of the rules or regulations of the Office of Price Administration, and in carrying out said transactions, followed the practice which was in existence and established at Defendant's place of business prior to the time the various rules and

regulations of the Office of Price Administration were put into effect and there was no intention, willful or otherwise, on the part of this Defendant, to violate any ceiling prices as alleged, and denies any violation thereof.

FIFTH DEFENSE

That the Defendant is not liable for damages as claimed in the within action, as anything done or omitted to be done respecting same was done in good faith by the defendant and pursuant to the provisions of the Emergency Price Control Act of 1942, and the defendant in doing what it did and in omitting to do any of the things complained of did so in good faith an exercise all practicable [12] diligence under the circumstances to comply with the provisions of said law.

Wherefore, Defendant prays that Plaintiff's Complaint be dismissed, and that it have judgment against Plaintiff for its costs and disbursements herein.

/s/ JAMES ARTHUR POWERS
Attorney for Defendant

Service of the foregoing was made by leaving a certified copy thereof, at the office of the plaintiff's attorneys in Room 1011, Bedell Bldg., Portland, Oregon, on this 6th day of December, 1944.

/s/ JAMES ARTHUR POWERS
Of Attorney for Defendant

[Endorsed]: Filed Dec. 7, 1944.

In the District Court of the United States
for the District of Oregon

Civil No. 2502

CHESTER BOWLES, Administrator,
Office of Price Administration,

Plaintiff

vs.

EAST ST. JOHNS SHINGLE CO., INC.,
a corporation,

Defendant

MEMO OF DECISION

1. Undercoursing. Recovery for plaintiff—single damages.

2. Pre-Rail Trucking. I do not think that plaintiff has sustained the burden of proof. I do not feel convinced by a preponderance of the evidence that the interpretation of the regulations espoused by Mr. McCaffery and Mr. Bischoff is the correct interpretation as opposed to the interpretation advanced by the Seattle OPA office which defendant relied on.

3. Discount. I think plaintiff has failed to sustain the burden of proof. I do not feel convinced by a preponderance of the evidence that defendant granted discounts in the month of October, 1941, which, within the meaning of the regulations, it was bound later to grant.

4. The defendant acted in good faith. (In drawing this finding defendant's counsel will please follow the language of the statute as amended.)

5. Improper delegation of authority. I do not feel that plaintiff could lawfully make blanket delegation of the discretionary authority given him by the statute to sue in the cases deemed appropriate.

Dated this 15th day of December, A. D. 1944.

CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed Dec. 15, 1944. [14]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

It appearing to the Court that the memorandum of Decision previously filed herein contained adequate findings of fact, none further will be made except:

FINDINGS OF FACT

Defendant has proved to the satisfaction of the Court that it acted in good faith in all respects charged in the complaint and if Defendant's acts constituted any violation of the statute or of any regulation, order, or schedule issue thereunder it was neither wilfull nor the result of failure to take practicable precaution against the occurrence of the violation.

From the foregoing and the preceding Memorandum of Decision, the Court:

CONCLUDES

That Plaintiff is not entitled to prevail herein on any of its causes of action (claims) and the Defendant is entitled to a judgment dismissing the complaint and cause.

It Is Therefore Considered, Ordered and Adjudged that the complaint and the causes of action (claims) therein stated be and the same are hereby dismissed with prejudice. Costs to neither party.

Done and dated in open Court this 19th day of December, 1944.

/s/ CLAUDE McCOLLOCH

Judge

The parties may offer additional or amended findings under the Rule, if desired.

/s/ CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed in Open Court Dec. 19, 1944. [15]

[Title of Cause.]

March 19, 1945.

ORDER

Plaintiff appearing by Mr. J. S. Bischoff, of counsel, defendant by Mr. James Arthur Powers, of counsel. Whereupon, this cause comes on to be heard by the Court upon the motion of the plaintiff for supplemental findings of fact herein, and the Court having heard the arguments of counsel,

It Is Ordered that said motion be, and the same is hereby, denied. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To East St. Johns Shingle Co., Inc., a corporation,
defendants above named, and to James Arthur
Powers, its attorney.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment dismissing said action made and entered in the above entitled action on the 19th day of December, 1944.

Dated at Portland, Oregon this 24 day of February, 1945.

/s/ F. E. WAGNER

/s/ W. DUNLAP CANNON, JR.

Attorneys for Appellant
Chester Bowles,
Administrator

[Endorsed]: Filed Feb. 24, 1945. [17]

[Title of District Court and Cause.]

ORDER TO FORWARD EXHIBITS

It appearing necessary that the original exhibit in the above described cause accompany the transcript of record upon appeal to the Circuit Court of Appeals for the Ninth Circuit,

It Is Ordered that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all original exhibits introduced in evidence in this cause.

Dated at Portland, Oregon, this 23rd day of March, 1945.

CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed March 23, 1945. [18]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit.

1. Complaint.
2. Amended Answer.
3. Memorandum of December 15, 1944.
4. Findings of Fact and Conclusions of Law and Judgment of Dismissal.
5. Order denying Motion for Supplementary Findings of Fact and Conclusions of Law.

6. Transcript of Pre-trials held November 6 and December 1, 1944.

7. Transcript of Trial, December 5, 1944.

8. Notice of Appeal.

9. This Designation of Record.

10. Order to Forward Exhibits.

11. Transcript proceedings March 19, 1945, in re Motion Supplementary Findings of Fact and Conclusions of Law.

Dated at Portland, Oregon, this 21st day of March, 1945.

F. E. WAGNER

Of Attorneys for Appellant
[19]

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Designation of Record is hereby accepted in Portland, Multnomah County, Oregon, this 21st day of March, 1945, by receiving a duly certified copy thereof.

JAMES ARTHUR POWERS

Attorney for Defendant

[Endorsed]: Filed March 23, 1945 [20]

In the District Court of the United States
For the District of Oregon

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon,

do hereby certify that the foregoing pages numbered 1 to 21 inclusive, constitute the transcript of record on appeal from a judgment of said court therein number Civil 2502, in which Chester Bowles, Administrator Office of Price Administration, is Plaintiff and Appellant, and East St. Johns Shingle Co., Inc., is Defendant, and Appellee; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I am enclosing under separate cover the exhibits in this case. The four transcripts of proceedings taken in this case are herewith enclosed.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 24th day of March, 1945.

[Seal]

LOWELL MUNDORFF,

Clerk.

By F. L. BUCK

Chief Deputy. [21]

In the District Court of the United States
For the District of Oregon

Civil No. 2502.

CHESTER BOWLES, Administrator,
Office of Price Administration,

Plaintiff,

vs.

EAST ST. JOHNSON SHINGLE CO., INC.,
a corporation,

Defendant.

Portland, Oregon, Tuesday, December 5, 1944.
2:00 o'clock P. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Norman T. J. McCaffery, Enforcement Attorney, Office of Price Administration, Portland District, and Mr. Jerome S. Bischoff, Chief of the Lumber Enforcement Unit, San Francisco Regional Office, Office of Price Administration, appearing for the Plaintiff.

Mr. James Arthur Powers, Attorney for the Defendant.

TRIAL PROCEEDINGS [1]

Mr. McCaffery: I would like to call Mr. Johnson, please.

PLAINTIFF'S EVIDENCE

W. F. JOHNSON

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows: [3]

DIRECT EXAMINATION

Q. Mr. Johnson, were you ever employed by the Office of Price Administration in the local District Office in Portland? A. I was. [6]

Q. In what capacity, Mr. Johnson?

A. Investigator. [7]

Mr. McCaffery: Q. Well, let me ask you, Mr. Johnson, if the plaintiff's Exhibit A does not reflect the correct amount of the overcharge based on \$2.10 per square basis on the respective transactions referred to therein. A. It does. [21]

Mr. Powers: We will object to that unless he gives some date, now, your Honor, for this reason: There was no price on this so-called undercoursing, even on their own contention here as made by Mr. McCaffery, here until sometime in September of 1943, and these items they are claiming for, they start back in July of '43, before that price went into effect, the first one, and end on December 10th, and they don't claim we violated any—that they made any sales at any other time than those particular dates. So what might have been there at sometime other is not pertinent here. I dislike to object but I do think that he ought to limit the inquiry here to the times we are concerned with.

Mr. McCaffery: If it please the Court, if prior to the enact- [24] ment of M.P.R. 164 the sales of singles by the defendant were governed by Maximum Price Regulation 215—G.M.P.R.; I am sorry—and if Mr. Powers will examine the complaint he will find there was nothing in August—I mean in July—at all. The first sale referred to is the 14th of August, 1943.

Mr. Powers: Yes, that is right. I missed that.

Mr. McCaffery: And it jumps from August to October, which is clearly after the time which he refers to.

Mr. Powers: The amendment was September 9th—I believe it was. The August one is not afterwards, is it?

Mr. McCaffery: It is not after September, of course, but at the time of the August sale you were under G.M.P.R.

Mr. Powers: What is that?

Mr. McCaffery: That is General Maximum Price Regulation [25]

Mr. McCaffery: Q. Mr. Johnson, would you be kind enough to state the reason that you used the \$2.10 price per square on undercoursing in figuring your overcharges?

A. There was something—there was a place in the regulations, in the M.P.R., that said that where the people did not have an established price they should go back to March, 1942, and that should be the basis upon which they should sell their merchandise, and we went through the books pretty

carefully, and for March of 1942, invoices, and we found one sale that had been made at \$2.10 a square and that was the basis that I used prior to—I think that was prior to the time that this price came through from [29] Washington for \$2.00, if I am not mistaken.

Q. In other words, Mr. Johnson, you were proceeding under the General Maximum Price Regulation? A. Yes. [30]

Mr. Powers: Now there is only one other thing that does not seem to be in the record, your Honor. It has to do with the question of who is prosecuting this action, and whether there was any authority delegated. At the pre-trial Mr. McCaffery stated that he could not answer the question whether they had any direct authority from the Price Administrator. He stated that it was upon his initiative and the initiative of Mr. Bischoff that this [133] action was filed. And I asked him, well, did he have it up with the Washington office, the office of the OPA in Washington, whether they transmitted what they had here and whether they were directed to bring it, and as I recall it Mr. McCaffery said that he couldn't answer that. So I will call Mr. McCaffery now and we will find out what the situation is, please.

The Court: Did you file this complaint, or Mr. Bischoff?

Mr. McCaffery: Yes, your Honor.

The Court: Do you have the information he wants?

Mr. McCaffery: Yes, your Honor. The pre-trial proceedings show the information he wants. I stated at that time——

The Court: I remember there was a certain point where you said in the absence of Mr. Bischoff you could not answer. I don't remember what it was you could not answer, but I do remember you said that.

Mr. McCaffery: Well, this suit was instituted by Mr. Bischoff, as Regional Enforcement Attorney, and myself, as District Enforcement Attorney, under the authority delegated to us for that purpose by Chester Bowles, the Administrator of the Office of Price Administration, and there has been tendered, your Honor, and marked as a pre-trial exhibit, Revised General Order No. 3, which, if it has not been introduced in evidence to this point, I would like to offer at this time.

The Court: That was your thought?

Mr. McCaffery: Yes, your Honor. And I believe that the issue [134] in that respect is exactly the same as the issue in the Patrick case, which your Honor heard this morning, and it squarely presents the problem of the authority of the delegation.

The Court: It may be admitted. Let's get it marked, Mr. Powers. Mr. Person will take care of it later.

Mr. McCaffery: Thank you.

(See Plaintiff's Pre-Trial and Trial Exhibit 5, page 68.)

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 5

REVISED GENERAL ORDER 3*

Representation of Administrator in Court
Proceedings
Service of Process

General Order No. 3 is revised and amended to read as follows:

Pursuant to the authority conferred upon the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Orders 9125, 9250, 9280 and 9328, the following order is prescribed:

(a) Institution of an intervention in civil proceedings. The General Counsel or the Acting General Counsel, the Director of the Enforcement Division or the Acting Director, the Regional Attorneys or the Acting Regional Attorneys, and the Regional Enforcement Attorneys or the Acting Regional Enforcement Attorneys, are each authorized to institute and intervene in appropriate civil actions or proceedings, in the name of the Price Administrator; and any of them may authorize any other attorney employed by the Office of Price Administration to institute or intervene in appropriate civil actions or proceedings in the name of the Price Administrator. Except as herein provided, no other officer or employee of the Office of Price Administration, whether employed in the

*7 FR 2238, 4852, 7910. Formerly entitled "Administrative Order 1." Revised Order issued 6-10-43, 8 FR——.

principal office in Washington, D. C., or in any regional or field office, has authority to institute or intervene in proceedings on behalf of the Price Administrator.

(b) Service of process upon the Administrator. Service of process upon the Price Administrator may be made by serving him personally, or by leaving a copy thereof at the Office of the Secretary, Office of Price Administration, Washington, D. C. In actions commenced outside the District of Columbia to obtain judicial review of rationing suspension orders issued under Procedural Regulation No. 4, service of process upon the Price Administrator may be made by personal service thereof upon the District Director or, in the latter's absence, upon the Acting District Director of the Office of Price Administration for the OPA district in which the administrative proceedings resulting in the suspension order were originally instituted. No other officer or employee of the Office of Price Administration, whether employed in the principal Office in Washington, D. C., or in any regional or field office, is authorized to accept service of process on behalf of the Price Administrator or enter his appearance in any action or proceeding, except as herein provided.

(c) Appearance for the Administrator in defensive suits. The General Counsel or the Acting General Counsel, the Director of the Enforcement Division or the Acting Director, and the Assistant General Counsel or the Acting Assistant General Counsel in charge of the Court Review, Research

and Opinion Division are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any action or proceeding instituted against the Price Administrator or the Office of Price Administration in the Emergency Court of Appeals and in proceedings for the review of determinations of the Emergency Court of Appeals in the Supreme Court; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any such action or proceedings. The General Counsel or the Acting General Counsel, and the Director of the Enforcement Division or the Acting Director are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any other action or proceeding instituted against the Price Administrator or the Office of Price Administration; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any other such action or proceeding.

GEORGE J. BURKE,

Acting Administrator

Mr. Powers: Am I correct in this? The question I asked is whether you had any express authority for this case. I understand you did not have?

Mr. McCaffery: If I understand you, by express authority, the answer is no, we did not.

The Court: The situation is, their authority is under this—identify it.

Mr. McCaffery: This Revised General Order No. 3.

The Court: That is the authority, and their sole authority, to institute this case.

Mr. McCaffery: Yes, your Honor.

Mr. Powers: The defendant rests, your Honor.

Mr. Bischoff: The plaintiff rests.

(Thereupon, at 5:45 o'clock P. M., the evidence was concluded and oral arguments were made in behalf of the respective parties.) [135]

[Endorsed]: No. 11016. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. East St. Johns Shingle Co., Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 26, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11016

CHESTER BOWLES, Administrator,
Office of Price Administration,

Appellant,

v.

EAST ST. JOHNSON SHINGLE COMPANY,
Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action the appellant, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. The District Court erred in failing to award appellant judgment against the appellee for not less than \$467.83 on the first cause of action alleged in the complaint on the basis of the facts found by the Court as set forth in the Findings of Fact and Conclusions of Law on file herein.

2. The District Court erred in finding as a fact and concluding as a matter of law that the attorneys who instituted this action on behalf of appellant were without authority to do so.

3. The District Court erred in dismissing the action.

HERBERT H. BENT

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement Attor-
ney

Attorneys for the Appellant.

[Endorsed]: Filed May 31, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the following portions of the certified transcript to be contained in the printed record on appeal herein:

1. Complaint.
2. Amended Answer.
3. Memorandum Opinion of December 15, 1944.
4. Findings of Fact and Conclusions of Law and Judgment of Dismissal.
5. Plaintiff's Pre-trial and Trial Exhibit No. 5 in evidence.
6. So much of the certified transcript of testimony as follows: Beginning with the last full paragraph on page 133 of said transcript to the end of said transcript.
7. Notice of Appeal.
8. Designation of record in District Court.

9. Statement of Points filed with this Court.

10. This Designation of Record.

HERBERT H. BENT

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement Attor-
ney

Attorneys for the Appellant.

[Endorsed]: Filed May 31, 1945. Paul P.
O'Brien, Clerk.

No. 11,016

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT**

v.

**EAST ST. JOHNS SHINGLE CO., INC. (A CORPORATION),
APPELLEE**

BRIEF FOR APPELLANT

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,

DAVID LONDON,
*Chief, Appellate Branch,
Washington, D. C.*

HERBERT H. BENT,
Regional Litigation Attorney,

JEROME S. BISCHOFF,
Chief, Lumber Enforcement Unit,

NORMAN T. J. McCAFFERY,
*District Enforcement Attorney,
Portland, Oregon.*

SAMUEL MERMIN,
*Special Appellate Attorney, Washington, D. C.
Of Counsel,
Attorney for Price Administrator Bowles, Appellant.*

FILED

**PAUL P. O'BRIEN,
CLERK**

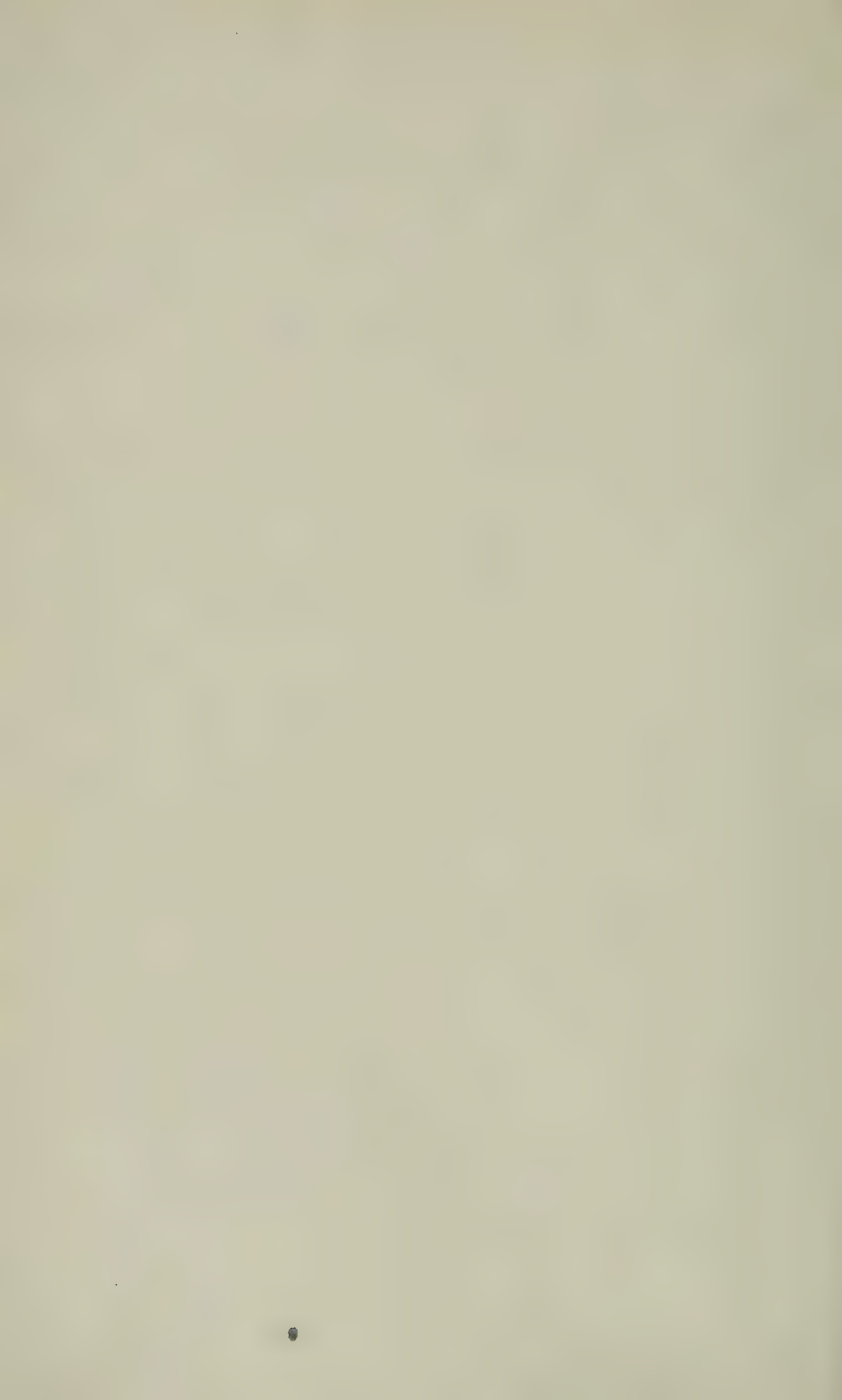
INDEX

	Page
Jurisdiction.....	1
Statutes and Regulations Involved.....	2
Statement of the Case.....	7
Specifications of Error.....	8
Argument:	8
The Suit Being Authorized, Judgment Should Have Been En- tered for Single Damages on the Basis of the Court's Own Findings.....	11
Appendix (Excerpts From Transcript of Trial Proceedings)	8

AUTHORITIES CITED

Cases:	
<i>Bowles v. Wheeler</i> (C. C. A. 9th, No. 10924, August 2, 1945).....	8
Statutes and Regulations:	
Emergency Price Control Act:	
Sec. 4 (a)	2
Sec. 205 (e).....	2
General Maximum Price Regulation:	
Sec. 1 (a)	6
Sec. 21.....	6
Maximum Price Regulation 164:	
Sec. 1381.2.....	5
Sec. 1381.11.....	5

(I)



In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,016

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

EAST ST. JOHNS SHINGLE CO., INC. (A CORPORATION),
APPELLEE

BRIEF FOR APPELLANT

JURISDICTION

This is an appeal by the Price Administrator from a judgment of the United States District Court for the District of Oregon in an action by the Price Administrator under the Emergency Price Control Act of 1942 (56 Stat. 23) as amended by the Stabilization Extension Act of 1944 (58 Stat. 636) seeking damages under Section 205 (e) as amended (50 U. S. C. App. Sec. 925 (e)). The judgment dismissing the action was entered December 19, 1944 (R. 18-19). Notice of Appeal was filed February 24, 1945 (R. 20).

Jurisdiction of the District Court was invoked under Section 205 (c) of the Act (50 U. S. C. App. Sec. 925 (c)) as indicated in the complaint (R. 3) and jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225).

STATUTES AND REGULATIONS INVOLVED

The action involves the Emergency Price Control Act of 1942, Maximum Price Regulation No. 164 ("Red Cedar Shingles") and the General Maximum Price Regulation.

1. *The Statute.*—Pertinent provisions of the Emergency Price Control Act as amended are as follows:

SEC. 4. (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

*

*

*

*

*

SEC. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable*

attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.¹ For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.² If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not en-

¹ As amended by Section 108 (b) of Stabilization Extension Act of 1944, 58 Stat. 636. Formerly read, in place of italicized language: "* * * bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the Court."

² Added by Section 108 (b) of Stabilization Extension Act of 1944.

titled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.³ [The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act

³ As amended by Section 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: “* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.”

*and with respect to proceedings instituted thereafter.]]*⁴

2. *The Regulations.*—A. *Maximum Price Regulation 164* (8 F. R. 2872, 12296):

SEC. 1381.2. Items not priced. (a) If a seller wishes to sell a grade or size which is not specifically priced in the price tables, or wishes to make an addition for specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington, D. C., for a maximum price. He must provide the following information:

- (1) The requested price;
- (2) A complete description of the item, practice or service for which approval is requested;
- (3) The price differential between it and the most comparable item in the price tables, between October 1, 1941 and June 1, 1942, from the seller's own records, or if that is impossible, from the experience of the trade. If no established price differential which can be used for comparison existed, a detailed analysis of the calculation of the price should be furnished.

(b) As soon as the request has been filed, quotations, and deliveries may be made at the requested price, but the final payment may not be made until the price has been approved. Action on the request may be by letter or telegram.

* * * *

Sec. 1381.11. Appendix A: Maximum prices for red cedar shingles. (a) The maximum

⁴ Matter in brackets added by Section 108 (c) of Stabilization Extension Act of 1944. The reference to "subsection (b)" is to Section 108 (b) of that Act.

price f. o. b. mill per square, green or dry, when graded in accordance with U. S. Department of Commerce, Commercial Standards C. S. 31-38 for Red Cedar Shingles for No. 1 grade and in accordance with the Standards and Grading Rules of the Red Cedar Shingle Bureau as revised June 1, 1939 for No. 2 and No. 3 grades, in mixed or straight load shipments, shall be:

Length and thickness	Width	Grade		
		No. 1	No. 2	No. 3
16'' 5/2 (XXXXX).....	Random.....	\$4.35	\$3.50	\$2.45
	5''.....	5.10	4.25	3.20
	6''.....	5.20	4.35	3.30
18'' 5/2¼ (Perfections).....	Random.....	4.75	3.65	2.60
	5'' or 6''.....	5.50	4.45	3.35
18'' 5/2 (Eurekas).....	Random.....	4.55	3.55	2.50
24'' 4/2 (Royals).....	Random.....	5.85	4.00	2.65

B. General Maximum Price Regulation (7 F. R. 3153, 4659):

SEC. 1 [§ 1499.1]. *Prohibition against dealing in commodities or service above maximum price.* On and after the effective date of this Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted by this Regulation.

* * * * *

SEC. 21 [§ 1499.21]. *Effect of other price regulations.* Sections 1499.13, 1499.14, 1499.15, 1499.25 of this General Maximum Price Regulation shall apply but the other provisions of this General Maximum Price Regulation shall not apply to any sale or delivery for which a

maximum price is in effect, at the time of such sale or delivery, under the provisions of any other price regulation issued, or which may be issued, by the Office of Price Administration, unless otherwise provided in any such price regulation.

STATEMENT OF THE CASE

This suit was based on three causes of action (R. 2-6) for overcharges in the sale of various types of shingles under Maximum Price Regulation 164 ("Red Cedar Shingles"). Only the first cause of action is involved in the appeal (R. 33). This first cause of action was for overcharges in the sale of a low-grade type of shingle known as "undercoursing."

The court below found in the Memo of Decision (R. 17)—which was incorporated into the Findings and Conclusions (R. 18)—that plaintiff had established a cause of action for "single damages." The reason for limiting the recovery to single damages was the Court's further findings that defendant's conduct had not been wilful or the result of failure to take practicable precautions (R. 18)—thus limiting the plaintiff Price Administrator to recovery of only the single overcharge, pursuant to Section 205 (e) of the Act as amended.

However, coupled with this finding for recovery of single overcharges was the further finding that the suit had been instituted without lawful authority because the Act did not permit the Price Administrator to delegate the suit-bringing function. Consequently, in spite of the right to recovery of single

damages had the suit been lawfully instituted, the Court concluded that the suit must be dismissed (R. 19).

SPECIFICATIONS OF ERROR

1. The Court below erred in finding and concluding that the Act did not permit the plaintiff Price Administrator to delegate the discretionary authority to institute suits.

2. The Court below erred in failing to enter judgment for the "single damages" which it found the Administrator was entitled to recover.

3. The Court below erred in dismissing the action.

ARGUMENT

The suit being authorized, judgment should have been entered for single damages on the basis of the Court's own findings

(1) The Administrator's delegation of the authority to institute suits, to, *inter alia*, the Regional Enforcement Attorney or his delegate, was made in Revised General Order 3 (R. 29) issued June 10, 1943, and suit was instituted pursuant to that authority (R. 28) on June 26, 1944 (R. 6). In addition, the suit was ratified by the Administrator on September 7, 1944 (Second Revised General Order 3, 9 F. R. 11137).

The ruling of the Court that the Act does not authorize the Administrator's delegation of the authority to institute suits under Section 205 (e) raises precisely the issue involved in *Bowles v. Wheeler*, No. 10924, which has just been decided adversely to appellee's contention (August 2, 1945).

(2) Since, then, the suit was lawfully instituted, it follows in the present case that judgment should have been entered for single damages. The Court specifically found the Administrator was entitled to recovery of single damages (R. 17-18) and would clearly have entered judgment therefor had it not been for the ruling on the authority to institute suit. Appellee has not cross-appealed from the finding for single damages, and it is therefore conclusive here.

It is not clear, however, whether the Court's finding for recovery of "single damages" is for recovery of the overcharges *specified* in the complaint, or whether it is for the amount exceeding the applicable maximum price. The uncertainty arises from these facts: As appellee conceded at the trial, a maximum price of \$2 for these undercoursing shingles had been established, pursuant to appellee's application, under Section 1381.2 of Maximum Price Regulation 164,⁵ which provided for applications for prices where the particular item was not specifically priced by the Regulation. The first violative sale listed in Exhibit A of the complaint, being dated August 14, 1943, occurred prior to the promulgation of Section 1381.2;⁶ and since the undercoursing shingles could not be priced under MPR 164,⁷ that sale was governed by the General Maximum Price Regulation.⁸ The computation of overcharges for the August 14 sale was made on the basis of a \$2.10

⁵ Transcript of Trial Proceedings, pp. 8-11, 98, 106-07, printed as Appendix to this Brief.

⁶ This section of the Regulation became effective September 9, 1943. (8 F. R. 12296.)

⁷ Transcript, *supra*, p. 11. See Appendix herein.

⁸ F. R. 3153, 4659. See text, *supra*, p 6.

maximum price under the latter Regulation, and this maximum was (mistakenly) used as a basis for estimating the overcharges for the later sales.⁹ (R. 26-27).

It is therefore submitted that the judgment should be reversed with instructions that judgment be entered on the first cause of action for single damages, computed by reference to the maximum price applicable under the General Maximum Price Regulation for the August 14, 1943, sale, and under Maximum Price Regulation 164 for the sale, thereafter.

Respectfully submitted.

GEORGE MONCHARSCH,
Deputy Administrator for Enforcement.

DAVID LONDON,
Chief, Appellate Branch,
Washington, D. C.

HERBERT H. BENT,
Regional Litigation Attorney.

JEROME S. BISCHOFF,
Chief, Lumber Enforcement Unit.

NORMAN T. J. McCaffery,
District Enforcement Attorney,
Portland, Oregon.

SAMUEL MERMIN,
Special Appellate Attorney,
Washington, D. C.
Of Counsel.

Attorneys for Price Administrator Bowles,
Appellant.

⁹ This was done because the local office was then unaware that a specific maximum price of \$2 had already been established by the Administrator, pursuant to application to the Washington Office.

APPENDIX

EXCERPTS FROM TRANSCRIPT OF TRIAL PROCEEDINGS

(NOTE: The entire record was designated by the appellant (R. 21-22) but only a small part was designated for printing (R. 34). Appellant has filed a request that the Court consider the following matter along with the printed record.)

Testimony of W. F. JOHNSON.

P. 6. Direct examination by Mr. McCaffery:

Q. Would you please state your name?

A. W. F. Johnson.

Q. And your address?

A. 1331 Southwest Twelfth, Portland.

Q. And your present occupation?

A. Lumberman.

Q. Mr. Johnson, were you ever employed by the Office of Price Administration in the local District Office in Portland?

A. I was.

P. 7 Q. In what capacity, Mr. Johnson?

A. Investigator.

Q. And during what period, Mr. Johnson?

A. I think I went to work November 1st, 1943; I believe that is when it was; and I worked for them until sometime August or September, I have forgotten just what the date was, of this last year, 1944.

Q. And what branch of the OPA were you an investigator for, Mr. Johnson?

A. The Enforcement, Price Enforcement Division, I believe.

Q. What particular division?

A. Maximum Price regulation. Is that what you mean?

Q. In regard to what commodity, Mr. Johnson?

A. Oh. Lumber and shingles.

Q. And would you kindly state for the Court, Mr. Johnson, your experience in regard to lumber.

A. Well, I have had over thirty years' experience as a retail lumber dealer, where I had lumber, shingles, and mill work; and then I have had about fifteen years—well, about ten years as a lumber manufacturer and logger, and about five years as a wholesaler.

Q. And what period of your lumber experience has been in Oregon, Mr. Johnson?

A. Since 1919.

P. 8 Q. And have you had any particular experience with shingles, Mr. Johnson?

A. Well, I always handled shingles in my retail lumber business, and then after that shingles were part of the lumber business. If you know lumber, why, you know something about shingles.

Q. And in your capacity as a lumber investigator for the Office of Price Administration, Mr. Johnson, did you have occasion to make an examination of the records of the East St. Johns Shingle Company of Portland?

A. I did.

Q. What was the purpose of your investigation, Mr. Johnson?

A. To find if there had been any price violations of the OPA regulations, M. P. R., I think we called it, 164—Maximum Price Regulation No. 164 and its amendments.

Q. You are familiar with that regulation, Mr. Johnson?

A. Yes, I was at the time. I guess I still remember most of it.

Mr. McCaffery. Would you be kind enough to hand this Maximum Price Regulation 164 as amended to Mr. Johnson?

Mr. Powers. Does that have all the amendments on it?

Mr. McCaffery. It has all the amendments up to R. M. P. R. 164, which is not involved in this case.

MR. POWERS. That is the one of October?

MR. MCCAFFERY. That is, the Revised which I mentioned in the pre-trial is not involved in this case.

MR. POWERS. As far as I am concerned, you may state to the Court what it is.

P. 9. MR. MCCAFFERY. I have.

MR. POWERS. Well, in other words, I had as soon as you would describe it as Mr. Johnson, if you want to introduce it in evidence.

MR. MCCAFFERY. I am not using it to introduce in evidence, Jim. I want Mr. Johnson to look through that and see if he can find the price for No. 1 shingles.

MR. POWERS. We will object to that. The records speak for themselves. Mr. McCaffery can tell you what it is, your Honor, and there will be no question about it.

THE COURT. He may answer subject to the objection.

MR. MCCAFFERY. MR. JOHNSON, would you examine that regulation and tell me what the price is for No. 1 shingles?

A. Well, they were different prices at one time.

Q. You can qualify your answer, Mr. Johnson, in stating —

A. How?

Q. You can qualify your answer in stating the date to which you refer when you give me the price of No. 1 shingles.

MR. POWERS. May I interpose this objection? There is no question here about the charge for No. 1 shingles, nothing whatsoever—nothing in any one of these three causes of action that I know of.

MR. MCCAFFERY. That is true, your Honor. The only purpose is having Mr. Johnson find the price of No. 1 shingles is to show his familiarity with the regulation and the use of the same.

A. The price was \$4.00 on No. 1, three and a quarter on No. 2.

P. 10 The COURT. Where are you looking, Mr. Johnson?

A. Amendment No. 5.

The COURT. All right.

A. Four and a quarter on No. 1, three and a quarter on No. 2 and two and a quarter on No. 3 at that time.

Mr. McCaffery. Mr. Johnson, from an examination of the regulation, can you tell me what the price for undercoursing, or a cull-type of shingle, commonly known in the trade as No. 4, is?

Mr. Powers. We will object to what it is "commonly known in the trade as," your Honor.

Mr. McCaffery. I will withdraw that question.

Q. Mr. Johnson, from your experience in the lumber business and familiarity with shingles, have you ever had occasion to be concerned with what is known as undercoursing?

A. I have.

Q. And what in your opinion, Mr. Johnson, is undercoursing?

A. Well, it is a very low grade; it is an offgrade, a very low grade of shingle that was generally prior to the war used for where you were going to side your house, or something of that kind, and you wanted to put on an undercoursing, as they then called it, and then you afterwards put on a shingle over that; it might have been a No. 1 or it might have been a shake, or it might have been some other type, but it was used as additional protection against the weather and being a very cheap type of article that is what it was known as—undercoursing.

P. 11 Q. Mr. Johnson, is it so commonly known in the trade?

A. Yes. I think that was the common practice.

Q. Mr. Johnson, from an examination of M. P. R. 164 as amended, can you determine a price for this type of shingle known as undercoursing, or commonly known as No. 4 shingle?

A. There was no price on that type of shingle. When they made this regulation—it is proper to say something? If it is not proper——

The COURT. Yes.

The WITNESS. When they made this regulation the effort was made to cut down and eliminate as much as possible, and simplify it, I might say, so they made the three grades, which were standard grades, and No. 4—the regulations carried a clause stating that on anything other than those three grades the manufacturer who wants to put that on the market shall write to the Office of Price Administration in Washington, or get it through the Branch Offices. I think either way, and get a price, a special price. He shall describe the article which he proposes to make and as well the price which he wants for it, and then they set a price for it.

* * * * *

Testimony of WESLEY W. GOTCHER.

Direct examination by Mr. POWERS:

p. 97 Q. State your name, please.

A. Wesley W. Gotcher.

Q. You are the president of the East St. Johns Shingle Company?

A. That is right.

* * * * *

p. 98 Q. Was undercoursing covered by the regulation that first came out?

A. No.

Q. And the first time you got a price is when you wrote in for it?

A. That is right.

*

*

*

*

*

Testimony of GERTRUDE GOTCHER.

p. 106 Direct Examination by Mr. POWERS:

Q. Your name is Gertrude Gotcher, you are the wife of Mr. Gotcher, and you are the secretary-bookkeeper of the defendant?

A. Yes.

Q. Mrs. Gotcher, with respect to the first cause of action, which is the undercoursing, do you know how it was that—or was there a price on that at all until you wrote in to get a price?

A. I never knew of any.

Q. And what brought it to your attention that you should write in?

A. Well, through numerous conversations with my brother, of the Portland Shingle Company, who, in so many matters, had more information than we did because he belonged to the Advisory Committee.

Q. He is a member of the Advisory Committee of the Cedar Shingle Industry?

p. 107 A. Yes, sir.

Q. Advisor of the OPA?

A. Yes, sir.

Q. And when you knew about that you wrote in, did you, and got this information?

A. Yes.

Q. Did you sell any of this undercoursing or backing after you were told the price would be \$2.00 at a higher price than two?

A. No. It was never our intention to, and I don't believe we did. However, it appears there is one car that got out at a price, how I don't know, because we had other people working in the office. But there is one on the record. It was never our intention to go above the ceiling price after it was established.

No. 11,016

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, Administrator,
Office of Price Administration,

Appellant,

v.

EAST ST. JOHNS SHINGLE CO., INC.,
(A Corporation),

Appellee.

Brief for Appellee

Upon Appeal from the District Court of the United States
for the District of Oregon

JAMES ARTHUR POWERS,
Attorney for Appellee

FILED

SEP 13 1945

PAUL P. O'BRIEN,
CLERK

No. 11,016

**In the United States
Circuit Court of Appeals**

For the Ninth Circuit

CHESTER BOWLES, Administrator,
Officer of Price Administration,

Appellant,

v.

EAST ST. JOHNS SHINGLE CO., INC.,
(A Corporation),

Appellee.

Brief of Appellee

STATEMENT

The District Court made a memorandum of decision on December 15, 1944. At that time the District Court was of the opinion that Plaintiff was entitled to recover single damages on the First Cause of Action. Four days later, on December 19, 1944, the Court entered Findings of Fact and Conclusions of Law (T. 17-19). Obviously, the District Court reconsidered the position it had taken respecting single damages to be allowed on the First Cause of Action. Appellant in its statement of the case attributes the Court's reconsideration entirely to the proposition of whether there was "improper delegation of authority" by the named Plaintiff to other persons to maintain the action. This assumption by Appellant does not seem to be entirely justified in light of the Dis-

trict Court's statements contained in the Findings of Fact and Conclusions of Law subsequently entered by the Court.

There were several factual matters in issue which the Court could have taken into consideration in dismissing the First Cause of Action. Unfortunately, Appellant did not see fit to include in the transcript of the record sufficient testimony to show the various points that were raised in connection with the First Cause of Action and which of necessity would have to be found in favor of the plaintiff below in order to sustain a recovery for the violation claimed. Appellant seeks to supplement the record to some extent by an appendix contained in his brief. However, such supplement if it is allowed by this Court is unfair because it leaves out evidence in the record as to the top price charged by the Appellee for undercoursing during what the O.P.A. referred to as the controlling period, namely, March, 1942. There was evidence in the record that Appellee sold undercoursing at the rate of \$2.40 a square, which sum is higher than any of the sales referred to in the schedule attached to Appellant's First Cause of Action. The Court did not make a finding favorable to the Appellant respecting this price, and further the Court did not make a finding favorable to the Appellant that undercoursing is a shingle within the meaning of the regulation.

ARGUMENT

POINT ONE

Under the rules of this Court and the Federal Rules of Civil Procedure, if Appellant wanted to challenge the District Court's findings, Appellant should have complied with the rules and brought up sufficient record to this Court for a proper consideration thereof. The findings here are in favor of the Appellee, and they could have been entered on factual issues. Appellant does not have sufficient record before this Court to in any way support its claimed Specifications of Error No. 2 and No. 3 (their Brief, P. 8). Rule 52 (a) provides that,

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

In the absence of an adequate record, it is difficult to see how the Appellant can successfully contend that the District Court's Findings and Conclusions here “were clearly erroneous.”

POINT TWO

Appellant by his First Cause of Action sought to recover treble damages for alleged sales of undercoursing

above the "Maximum price established by Maximum Price Regulation 164." These sales were made between August 14, and December 10, 1943. The regulation covering the ceiling price of red cedar shingles is MPR 164. It became effective June 29, 1942. The regulations states that the administrator "has ascertained and given due consideration to the prices of red cedar shingles prevailing between October 1st and October 15th, 1941." The definition of the subject to be covered is, "Red cedar shingles means all types of shingles made from Western red cedar (*Thuja plicata*).". The regulation states the maximum price for red cedar shingles, classifying them as Grades I, II and III. There is no price set in the original regulation for undercoursing, and there is no catch-all provision in the original regulation requiring that application be made for a ceiling price of a by-product or a lower grade or an unclassified product.

The definition of the product covered by the regulation remained unchanged until Amendment 8 was issued on April 17, 1944, at which time the regulation was amended to include accessory items. The changed definition reads as follows: "'Red cedar shingles' means all types of shingles and accessory items made from Western Red cedar (*Thuja plicata*). For purposes of this regulation, the term includes all products (other than wastes) resulting from further refinement or processing

of red cedar shingles. Thus, all red cedar shingles, shakes, hip and ridge units, et cetera, are covered whether or not those products are stained, grooved, or otherwise specially processed." And finally, the definition of the subject matter covered by regulation issued October 18, 1944, was enlarged to include by-products in the following language, "For purposes of this regulation, the term includes all products (other than wastes) resulting from further refinement or processing of Western softwood shingles."

It will be seen that undercoursing was not included within the subject of the regulation at the time the alleged violations occurred. Appellant's attorney contends that the matter is covered by Amendment No. 5, effective September 9, 1943, "(a) If a seller wishes to sell a grade or size which is not specifically priced in the price tables, or wishes to make an addition for specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington, D. C., for a maximum price." The foregoing catch-all provision, if that is what it is intended to be, merely relates to what is defined as a red cedar shingle in the original regulation, and it does not relate to undercoursing which never is and never can be used as a shingle. This was recognized by the OPA when it enlarged the original defini-

tion of the subject by subsequent amendments as set forth above to cover by-products made in connection with the manufacture of red cedar shingles. Webster's International Dictionary defines a shingle as "1. A piece of wood sawed or rived thin and small, with one end thinner than the other,—used in covering buildings, especially roofs, the thick ends of one row overlapping the thin ends of the row below." Undercoursing is sold with large holes in it. It is used as insulation between walls. It is cut from the knotty part of the tree, which would be a waste inasmuch as it could not be made into even the lowest grade shingle, which is No. III. Having large holes in it because of the knots, it does form a use for an undercoursing or insulation, but by the same token and because of the large knot holes, it cannot be used to turn weather and cannot be used as a shingle and does not fall within the subject matter as defined by the regulations, which were in force at the time the alleged violations occurred. It is now included in the regulations, but by amendments subsequent to the time of the alleged violations, consequently Appellant was not entitled to prevail.

In conclusion it is submitted that Appellant failed to establish a violation and the District Court was correct in denying recovery.

Respectfully submitted,

JAMES ARTHUR POWERS,

Counsel for Appellee,

No. 11020.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALLEN I. DUNN,

Appellant,

vs.

CEDAR RAPIDS ENGINEERING COMPANY OF DELAWARE,
a corporation, and CEDAR RAPIDS ENGINEERING COM-
PANY, a corporation,

Appellees.

REPLY TO PETITION FOR REHEARING.

SHEPPARD, MULLIN & RICHTER, and
CAMERON W. CECIL,
640 Rowan Building, Los Angeles 13,
Attorneys for Appellees

TOPICAL INDEX.

	PAGE
Introduction	1
I.	
Article XII, Section 15, of the California Constitution is in- applicable to the facts in the case at bar.....	2
II.	
Stafford v. Groff is inapplicable to the facts in the case at bar....	5
III.	
The case of Miner v. United Air Lines Transport Corp. is con- trolling in the case at bar.....	6

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Hull v. Burr, 207 Fed. 543.....	3
Indian Refining Company, Inc. v. Royal Oil Company, Inc., 102 Cal. App. 710, 283 Pac. 856.....	4
Mann v. Brison, 120 Cal. App. 450.....	2
Miner v. United Air Lines Transport Corp., 16 F. Supp. 930....	6
Moore v. National Hotel Management Corp., 21 F. Supp. 177....	6
Nierbo v. Bethlehem Shipbuilding Co., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167.....	5
Norrie v. Kansas City So. Ry. Co., 7 F. (2d) 158.....	5
Stafford v. Groff, No. 2 Civ. 15218.....	5
Steinberg v. Aetna Fire Ins. Co., 50 F. Supp. 438.....	6

STATUTES.

California Constitution, Art. XII, Sec. 15.....	1, 2, 3
Civil Code, Sec. 405.....	2, 3
Civil Code, Sec. 406(a).....	2, 3

No. 11020.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN I. DUNN,

Appellant,

vs.

CEDAR RAPIDS ENGINEERING COMPANY OF DELAWARE,
a corporation, and CEDAR RAPIDS ENGINEERING COM-
PANY, a corporation,

Appellees.

REPLY TO PETITION FOR REHEARING.

Introduction.

The appellant in the above entitled action has filed a petition for rehearing. The basis for the petition seems to be that under Article XII, Section 15, of the California Constitution it would be unconstitutional for a federal district court sitting in California to refuse to accept jurisdiction in this case.

The appellant lays great stress upon the fact that he is a citizen of California.

It should be recalled that all matters relating to the action in the case at bar took place in Iowa—the appellant was a resident of Iowa at the time he entered into the contract [Tr. p. 3]; the contract was executed and to be performed in Iowa [Tr. pp. 3, 22, 26]; the appellees had

their offices and principal places of business in Iowa [Tr. pp. 2-3]; and neither of the appellees was ever a resident of California.

Under this state of facts the appellant then moved from Iowa to California and brought his action here wherein the sole basis for the claim of jurisdiction was the service of process upon a *statutory* agent.

I.

Article XII, Section 15, of the California Constitution Is Inapplicable to the Facts in the Case at Bar.

The appellant argues for the first time in his petition for rehearing that to refuse to extend the scope of Sections 405 and 406(a) of the California Civil Code so as to require the exercise of jurisdiction in the case at bar would be to place an unconstitutional interpretation upon these sections by virtue of the provisions of Article XII, Section 15, of the California Constitution.

As was said in *Mann v. Brison*, 120 Cal. App. 450, 452-453 (Hearing denied, 1932):

“In denying a rehearing in this case it is proper to note the fact that the point and argument supporting it to the effect that the charter provision involved is unconstitutional is made for the first time in the petition for rehearing. It has been repeatedly stated that a rehearing will not be granted for the purpose of considering suggestions made under such circumstances. (*In re Novotny's Estate*, 94 Cal. App. 782-790 [271 Pac. 923, 273 Pac. 58]; *Pasadena Ice Co. v. Reeder*, 206 Cal. 697-705 [275 Pac. 944, 276 Pac. 995], and *People v. New York Indemnity Co.*, 113 Cal. App. 487 [298 Pac. 849].)”

To the same effect, see:

Hull v. Burr, 207 Fed. 543, 544 (C. C. A. 1st, 1913).

Even if appellant had made timely issue of this point, it would have availed him nothing.

Article XII, Section 15, of the California Constitution provides:

“No corporation organized outside the limits of this State *shall be allowed to transact business within this State* on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State.” (Italics added.)

A mere reading of this provision reveals that it refers only to transacting “business within this State,” that is, the State of California. The contracts sought to be rescinded here were made, executed and to be performed in Iowa and are, therefore, not “business within this State,” and Article XII, Section 15, is inapplicable by its own terms.

This section is likewise inapplicable because it merely provides a prohibition against legislation allowing a foreign corporation to transact business *within this state* on more favorable conditions than a domestic corporation. Sections 405 and 406(a) of the California Civil Code are not such legislation. Those sections relate only to the manner of maintaining a lawsuit against a foreign corporation, and it is clearly established California law that the maintenance of a lawsuit is not the transaction of “business within this state.”

As the court said in *Indian Refining Company, Inc. v. Royal Oil Company, Inc.*, 102 Cal. App. 710, 713-714, 283 Pac. 856 (1929):

“Appellants first insist that the bringing of this action, in itself, constituted doing business in this state, within the meaning of the statutes governing this case. (Stats. 1923, p. 1037.) We think that this contention cannot be upheld. (*General Conference of Free Baptists v. Berkey*, 156 Cal. 466 [105 Pac. 411].) Where a foreign corporation has complied with the provisions of law enabling it to do business in this state, and has subsequently withdrawn from such intrastate business, and filed the certificate thereof in the proper manner, there is nothing in our law to prevent it from subsequently maintaining an action to collect an account that arose while it was lawfully doing business in this state, and *the filing of such an action does not constitute doing business within the meaning of the statute.*” (Italics added.)

Manifestly, the appellant cannot rely upon this Constitutional provision, since he has not made timely issue of this point; and even if he had, the section is inapplicable in the case at bar.

II.

**Stafford v. Groff Is Inapplicable to the Facts in the
Case at Bar.**

A full discussion of *Stafford v. Groff* cited at page 4 of the appellant's petition for rehearing would be of little help to the court in the case at bar.

The record in that case clearly shows that the cause of action arose in California, and the subject matter of the controversy had its locus in California.

The quitclaim deed which was allegedly procured by fraud was executed in California (*Stafford v. Groff*, No. 2 Civ. 15218 [Clk. Tr. p. 60, lines 13-20]), and the plaintiffs' property which was allegedly damaged had its locus in California (*Stafford v. Groff*, No. 2 Civ. 15218 [Clk. Tr. p. 59, lines 13-20].)

Thus the *Stafford* case is similar to *Neirbo v. Bethlehem Shipbuilding Co.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. ed. 167 (1939), and *Norrie v. Kansas City So. Ry. Co.*, 7 F. (2d) 158 (D. Ct., S. D. N. Y., 1925) relied upon by the appellant on the first hearing of this case and held by this court not to be in point.

III.

The Case of *Miner v. United Air Lines Transport Corp.* Is Controlling in the Case at Bar.

The clear federal policy of refusing to extend the exercise of jurisdiction to transactions occurring outside California where the language of the California statute providing for appointment of agents for service of process does not clearly manifest the intention of the state to assume jurisdiction in such matters, and there has been no decision by the state courts expressing such intention, is set forth in *Miner v. United Air Lines Transport Corp.*, 16 F. Supp. 930, 931 (D. Ct., S. D. Calif., 1936).

Accord:

Steinberg v. Aetna Fire Ins. Co., 50 F. Supp. 438 (D. Ct., E. D. Penn., 1943);

Moore v. National Hotel Management Corp., 21 F. Supp. 177 (D. Ct., N. D. Tex., 1937).

The *Miner* case (*supra*) was decided almost ten years ago. The California legislature has met many times since this decision and has not amended the statute so as to include within its operation suits founded upon causes of action arising out of business done by a foreign corporation outside this state.

This court therefore correctly held that it does not appear that authorization for California State courts to entertain the instant action can be read into the statute by a United States Circuit Court.

Wherefore, it is respectfully submitted that the petition for rehearing should be denied.

SHEPPARD, MULLIN & RICHTER, and
CAMERON W. CECIL,
Attorneys for Appellees

No. 11020.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALLEN I. DUNN,

Appellant,

vs.

CEDAR RAPIDS ENGINEERING COMPANY OF DELAWARE, a
corporation, and CEDAR RAPIDS ENGINEERING COM-
PANY, a corporation,

Appellees.

BRIEF OF RAY HOWARD, AMICUS CURIAE.

RAY HOWARD,
303 Ohio Oil Building, Los Angeles 13,
Amicus Curiae.

FILED

DEC 1 1946

PAUL P. O'NEIL
CLERK

TOPICAL INDEX.

	PAGE
Introduction	1
Authorities from other jurisdictions not controlling.....	2
The effect of the constitutional provision in California.....	3
The problem is somewhat peculiar to California.....	5
Failure of appellant to mention Constitution.....	6
Miner v. United Airlines.....	7
Stafford v. Groff.....	7

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Mann v. Brison, 120 Cal. App. 450, 7 Pac. (2d) 1110.....	6

STATUTES.	
Civil Code, Secs. 405-406(a).....	2, 6
California Constitution, Art. XII, Sec. 15.....	2

No. 11020.
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALLEN I. DUNN,

Appellant,

vs.

CEDAR RAPIDS ENGINEERING COMPANY OF DELAWARE, a
corporation, and CEDAR RAPIDS ENGINEERING COM-
PANY, a corporation,

Appellees.

BRIEF OF RAY HOWARD, AMICUS CURIAE.

Introduction.

Honorable Albert Lee Stephens has kindly indicated the Court's willingness to accept my brief *Amicus Curiae* on appellant's petition for rehearing. My interest in the question involved is that I am an attorney for the respondent in the pending appeal of *Stafford v. Groff*, No. 2 Civ. 15218 in the District Court of Appeal, Second Appellate District, California. It involves the related question as to the garnishment of a debt owing by a foreign corporation. This interest alone prompted counsel for appellant herein to name me as "of counsel" in this case, which I hope is not in conflict with my position as *amicus curiae*.

Authorities From Other Jurisdictions Not Controlling.

I have read the respective briefs, the petition for rehearing and the reply thereto. I do not feel that I should attempt citation of authorities, whether already cited or not, from other jurisdictions. There seems to be no decision one way or the other in this jurisdiction, bearing on the effect of *Article XII, Section 15, of the Constitution of California*, nor is any similar provision of the constitution or laws of any other state, noticed in any decision in any other jurisdiction. I therefore assume that there was no such provision involved in any of them.

The question then, is an open one in California, in view of that provision. The most that any court has held is that in order to uphold jurisdiction, it must appear that the legislature of the particular state where the action is brought, intended by the language used in its statute corresponding to Sections 405-406(a), C. C., not to exclude, but to include, actions on claims arising out of the state. In the absence of such a constitutional provision in any state whose statute was construed in any of the decisions cited, it cannot be said that there was a holding that its legislature would have intended to make such a limitation had there been such a provision in its constitution.

(The effect of *Miner v. United Airlines*, will be discussed below.)

The Effect of the Constitutional Provision in California.

I now refer to the opening paragraph of appellees' Introduction and to its Point I at page 3 of the reply. A more accurate statement of "The basis for the petition" should be, as I read the petition:

"that under Article XII, Section 15, of the California Constitution *it would seem unreasonable to assume that the Legislature intended to provide for a federal district court sitting in California (or any California court) to refuse to accept jurisdiction in this case.*"

(The basis does not seem to be only, or necessarily, that it *would be unconstitutional.*)

Appellees apparently understand appellant's reference to the words in Section 15, italicized in their quotation thereof: "*shall be allowed to transact business within this State,*" as a contention that the business *from which the claim sued upon arose*, is the business *transacted* by the foreign corporations. They say that this business was transacted in Iowa and that therefore the constitutional provision obviously does not apply.

But that is not the point which I believe appellants make, nor what I want to emphasize. *The point is*, if appellant's petition does not already make it clear, that the holding and managing of property in California, the conduct of general business and the accumulating of assets therefrom, not connected with the transaction sued upon, is the business to be considered. Its connection with the claim sued upon is slightly indirect, but most important since it involves collecting on the judgment. It concerns a California citizen who sued a foreign corporation on a debt incurred elsewhere, *because those are the assets, and*

possibly the only assets, out of which he can get his judgment satisfied. They certainly should be those most easily reached. Those are the assets which the foreign corporation is privileged, by special permission of California law, to bring into California and to use under the protection of California law, and through the use of California's climate and natural resources. They may be increased possibly many fold, by dealing with the population of California.

Such assets should not be immune from attachment and/or execution on debts in favor of Californians, wherever contracted. If the foreign corporation holding the assets cannot be sued and served in California, they are immune. To hold, manage and use such assets is "to transact business within this State," and to do so without fear of having them taken for its debts wherever contracted, is to do so "on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

As pointed out in the petition for rehearing, a Californian might have a quick and sure remedy against a domestic corporation and against its property, on a debt incurred elsewhere, but would not have it against a foreign corporation or property owned by it adjoining that of the domestic corporation, on a similar debt arising at the same place. Appellees might have given a *partial* answer to this by urging that attachment of the foreign corporation's property and publication of summons against it would be a means of reaching its California assets. But the numerous delays, expense and other limitations on this remedy, complicated by its having agents in California and its probable then contention that it was entitled to personal service, make such remedies much less effective than

those available against domestic corporations. The foreign corporation would still be transacting its business on more favorable conditions than those prescribed for domestic corporations. This factor does away with even the above suggested argument for appellees, which is the only one I believe they could make.

The argument at the bottom of page 3 and page 4 falls also because it overlooks that the point is that the *owning, etc. of property* is transacting business, and assumes that the bringing of suits *by* foreign corporations is claimed by appellants to be the transaction of business.

I close my discussion of this point with the reminder that we are considering what must have been *in the minds of the legislators* in not expressly excluding from the powers of California courts over actions against foreign corporations, those on claims arising elsewhere, as legislatures of some states have done.

The Problem Is Somewhat Peculiar to California.

This is because in California we have always had large numbers of people from other states making their homes here, and naturally they bring with them as part of their estates, claims which arose in their former home states. And, especially lately, we have many foreign corporations locating here, many owing such debts. These people pay for maintaining California courts, and should be entitled to use them.

Foreign corporations are, of course, welcome to their fair share of the climate, etc., above and frequently men-

tioned in California, but let us ask what would be the effect of their asking for special privileges when they file their papers with the Secretary of State. Would this Court compel him to accept a designation of agent on whom process might be served, with the limitation therein that the process could be only on claims arising in the State? And if they can put that limitation in their designation, why could they not insert such other restrictions as they see fit?

Failure of Appellant to Mention Constitution.

It would be unfortunate if the decision of this case as it now reads, should stand as the law and as precedent for the state as well as the federal courts, without reference to the effect of the constitutional provision, for no other reason than that the point had not been brought out in a particular way. The situation differs from that in the cited case of *Mann v. Brison*, 120 Cal. App. 450, 452-3; 7 Pac. (2d) 1110 (rehearing denied at 9 Pac. (2d) 257). In that case it was the claimed unconstitutionality itself of the law in question, which was raised on petition for rehearing. While the petition herein does argue that the reading into Sections 405 and 406(a) C. C. of a limitation to cases arising in this state, *would be unconstitutional if written there*, there is no such provision written there and hence no contention that it *is* unconstitutional. The reference to the provision seems to be merely an *additional reason* why it should not be held to have been in the minds of the legislators without being written. As I understand it, appellants have made this contention throughout.

Miner vs. United Airlines.

The opinion of the late District Judge Hollzer in that case (16 Fed. Supp. 930) follows the reasoning of some of the cases from eastern jurisdictions. While we all regard his work very highly, it is of course not controlling on this court. And as it does not take into consideration the California constitutional provision, it is no more persuasive than are the opinions in the cases from other jurisdictions.

The failure of the California legislature to amend the statute during the subsequent ten years, is explainable by the fact that there was nothing to amend. There was no limitation written into it, and, especially in view of the constitution which certainly needs no amending to make its meaning clear, and in view of the absence of any state court decision or of the point even being argued in the many instances, no doubt, when the point could have been raised, there was nothing which it would seem needed to be clarified.

Stafford vs. Groff.

This case not having been decided, nor even briefed, needs no special mention except as the reason for my own interest in the general questions. I might say, however, that appellees confuse the claim on which the principal action is based, with the claim sought to be subjected to attachment. The latter is an oil royalty owing by an Ohio corporation on an oil lease in Illinois to a citizen of that state, the principal action being by a citizen of California against that Illinois citizen on a claim arising in California.

It is submitted that this court should re-write its decision with the foregoing points in mind, as well as giving effect to the California citizenship of the appellant.

February 11, 1946.

Respectfully submitted,

RAY HOWARD,

Amicus Curiae.

No. 11021

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG and HARRIET A. KUCK-
ENBERG, co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

No. 11021

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG and HARRIET A. KUCK-
ENBERG, co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	2
Answer to Amended Complaint.....	8
Appeal:	
Certificate of Clerk to Transcript of Record on	34
Designation of Record on (DC).....	33
Designation of Record on (CCA)....	429
Notice of	32
Order re Exhibits on.....	430
Statement of Points on (CCA).....	426
Stipulation re Exhibits on.....	431
Certificate of Clerk to Transcript of Record on Appeal	34
Complaint, Amended	2
Designation of Record on Appeal:	
D. C.	33
C. C. A.	429
Findings of Fact and Conclusions of Law.....	22
Judgment on Dismissal.....	30
Names and Addresses of Attorneys.....	1

Index	Page
Notice of Appeal.....	32
Order re Exhibits (CCA).....	430
Order to Forward Exhibits (DC).....	31
Pre-Trial Order	10
Statement of Points on Appeal (CCA).....	426
Stipulation re Exhibits (CCA).....	431
Transcript of Proceedings of Pre-Trial Conference:	
March 13, 1944.....	36
May 22, 1944.....	54
June 12, 1944.....	94
Transcript of Proceedings (Nov. 14, 1944)....	121
Exhibits for Defendant:	
1—Contract dated July 3, 1942, between Kaiser Company, Inc., and Kuckenberg Construction Co.....	134
3—Letter dated Jan. 5, 1943, Kuckenberg Construction Co. to Construction and Road Maintenance Equipment Board, OPA.....	142
4—Letter, Feb. 5, 1943, Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, OPA.....	144
5—Statement, headed “Kuckenberg Rentals to A. J. Goerig Construction Co. Mar. 10, 1944”.....	147

Index	Page
6—Statement, headed “Kuckenberg Rentals to Buckler Company, etc. Andrew Lee Rapp 3/16/44”.....	152
Exhibits for Defendants—(Continued):	
7—Statement, “Kuckenberg Rentals to Lease & Leigland. Andrew Lee Rapp, March 20, 1944”.....	153
8—Statement, “Cost Summary—A. J. Goerig Construction Co., Bremerton Airport Rental of Equipment”	155
9—Statement, “Portland Payroll Totals—Dec. 12, 1942 to June 19, 1943”	156
10—Statement, Apr. 30, 1943, to A. J. Goerig Construction Co. headed “Hauling Charges”	157
11—Statement, “Summary of Invoices”	158
12—Statement dated Oct. 19, 1943, signed Henry A. Kuckenberg and addressed to Prentiss M. Brown, Price Administrator, etc.....	161
13—Statement dated Jan. 6, 1944, signed Harriet A. Kuckenberg and addressed to Chester Bowles, Administrator, OPA	161

Index	Page
Exhibits for Defendants—(Continued):	
14—Statement dated Jan. 6, 1944, signed Henry Kuckenberg and ad- dressed to Chester Bowles, Admin- istrator, OPA	162
15—Letter, May 5, 1944, Kuckenberg Construction Co. to Walter Shoe- maker, OPA	163
16—Letter, May 19, 1944, Kuckenberg Construction Co. to Walter Shoe- maker, OPA	165
17—Letter dated May 24, 1944, Walter Shoemaker, Head Construction and Extraction Equipment Section to Kuckenberg Construction Co.....	166
18—Letter dated June 1, 1944, Kucken- berg Construction Co. to Walter Shoemaker	168
19—A to 19-E—Copies of Five Letters, OPA Correspondence	171-178
20—A to 20-Q—Copies, etc. of Corre- spondence with OPA.....	179-196
21—Document, Mar. 9, 1944, headed “Sold to A. J. Goerig Construction Co.”, “Summary of Equipment, Possession by Lessee for OPA Reg- ulation #134 Rental Basis”.....	198

Index

Page

Exhibits for Defendants—(Continued):

22-A—1943 Kuckenberg-Buckler Rental “Summary Statement of Rentals for Six Motor Grader Units”.....	324
22-B—Summary Comparison of Actual Billing with OPA Maximum Rentals	332
23—Statement “Hourly Rate Analysis —Bare Rental — Kuckenberg-Goerig Rental, 1942- 1943”.....	212
24—Contract dated Nov. 30, 1942, signed Kuckenberg Construction Com- pany, accepted by A. J. Goerig Con- struction Co. and G. W. Walsh....	213
25—Agreement dated Jan. 9, 1943, signed Kuckenberg Construction Company and accepted by A. J. Goerig Construction Co.....	217
26—Statement “Bremerton Airport- Kitsap County, A. J. Goerig Con- tract. Recap-Repairs Bremerton Tractors”	219
35—Letter, Mar. 24, 1943, H. L. Morian, Major, Corps of Engineers to Kuckenberg Construction Company	391

Index	Page
Exhibits for Plaintiffs:	
7(a)—Order Defining and Delimiting Certain Functions and Powers of Officers and Employees.....	232
7(b)—Representation of Administra- tor in Court Proceedings Serv- ice of Process.....	234
7(c)—Basic Field Enforcement Or- ganization and Authority.....	237
7(d)—Memorandum to All Chief At- torneys, etc. from Ben C. Duni- way and John T. McTernan “Decentralization”	244
7(e)—Teletype, 6/4/43—John T. Mc- Ternan to Mr. McDannell Brown, OPA	245
Witnesses for Defendants:	
Byrne, E. E.	
—direct	284
—cross	286
—redirect	293
Cooley, H. E.	
—direct	296
—cross	301
—redirect	305
Giebisch, Gordon	
—direct	313
—cross	317

Index

Page

Witnesses for Defendants—(Continued):

Gordon, Lee H.

—direct 307

Kuckenberg, Henry

—direct 247

—cross 268-351

—redirect 389

Miller, Charles H.

—direct 319

—cross 343, 349

Witness for Plaintiff:

Rapp, Andrew Lee

—rebuttal, direct 393

—cross 397

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

F. E. WAGNER and
McDANNELL BROWN,

Bedell Building,
Portland, Ore.

W. DUNLAP CANNON JR.,

1355 Market Street,
San Francisco, California,

for Appellants.

ALBERT W. GENTNER,

825 Failing Building,
Portland, Oregon,

for Appellees.

In the District Court of the United States
for the District of Oregon

No. Civ. 2290

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG and HARRIET A. KUCK-
ENBERG, Co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,

Defendants.

AMENDED COMPLAINT

Plaintiff for his complaint against defendants and after due consideration and order of the above-entitled court to consolidate the following causes or counts in a single amended complaint alleges:

I.

In the judgment of the Administrator, the defendants have engaged in acts and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23), hereinafter called the "Act," in that defendants have violated Maximum Price Regulation No. 134, as amended, effective in accordance with the provisions of the Act; and therefore, pursuant to Sec-

tion 205(c) of the Act, the Price Administrator brings this action to enforce compliance with said regulation.

II.

Jurisdiction of this Count is conferred upon the court by Section 205(c) of the Act.

III.

During all the times herein mentioned, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 134, as amended, establishing a maximum price for rentals of construction and road maintenance equipment and machinery. [1*]

IV.

From and including the 3rd day of December, 1942, and until the 30th day of March, 1943, the defendants rented construction and road maintenance equipment and machinery to Goerig Construction Co., a co-partnership, at prices higher than the maximum prices as provided for in said Maximum Price Regulation No. 134.

Plaintiff for a second Count against defendants alleges:

I.

Plaintiff, as Administrator of the Office of Price Administration, brings this action against defendants for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942, as

*Page numbering appearing at foot of page of original certified Transcript of Record.

amended, (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23), hereinafter called the "Act."

II.

Jurisdiction of this Court is conferred upon the court by Section 205(c) of the Act.

III.

During all the times herein mentioned, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 134, as amended, establishing a maximum price for rentals of construction and road maintenance equipment and machinery.

IV.

From and including the 3rd day of December, 1942, and until the 30th day of March, 1943, the defendants rented construction and road maintenance equipment and machinery to Goerig Construction Co., a co-partnership, at prices higher than the maximum prices as provided for in said Maximum Price Regulation No. 134.

V.

All of the transactions referred to in Paragraph IV occurred within one year immediately preceding the filing of this Complaint and none of said rentals were for use or consumption other than in the course of trade or business. [2]

VI.

Three times the aggregate amount by which the prices received by the defendants in the transac-

actions herein referred to exceed the maximum prices provided by Maximum Price Regulation No. 134, as amended, equals Fifty-six Thousand Four Hundred Sixty-seven Dollars and Thirty-eight Cents (\$56,467.38).

Plaintiff for a third Count against defendants alleges:

I.

Plaintiff, as Administrator of the Office of Price Administration, brings this action against defendants for treble damages on behalf of the United States pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act of 1942, as amended, (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23), hereinafter called the "Act."

II.

Jurisdiction of this Count is conferred upon the court by Section 205(c) of the Act.

III.

During all the times herein mentioned, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 134, as amended, establishing a maximum price for rentals of construction and road maintenance equipment and machinery.

IV.

From and including the 1st day of January, 1943, and until the 15th day of September, 1943, the defendants rented construction and road maintenance equipment and machinery to the Buckler Corpora-

tion, George H. Buckler, George H. Buckler, Contractor, George H. Buckler Co., and Oregon Shipbuilding Corporation, all of Portland, Oregon, at prices higher than the maximum prices as provided for in said Maximum Price Regulation No. 134.

V.

All of the transactions referred to in Paragraph IV occurred within one year immediately preceding the filing of this Complaint and none of said [3] rentals were for use or consumption other than in the course of trade or business.

VI.

Three times the aggregate amount by which the prices received by the defendants in the transactions herein referred to exceed the maximum prices provided by Maximum Price Regulation No. 134, as amended, equals Seven Thousand Six Hundred Seven Dollars and Nineteen Cents (\$7,607.19).

Wherefore, Administrator prays for a preliminary and final injunction enjoining the defendants and each of them, their officers, agents, servants, employees, attorneys and all persons in active concert or in participation with defendants from directly or indirectly renting, or offering to rent, construction and road maintenance equipment or machinery at prices higher than maximum prices established therefor in Maximum Price Regulation No. 134, as amended, or agreeing to do anything in violation thereof, or in violation of any regulation or order issued pursuant to the Act establishing

maximum prices for the rental of construction and road maintenance equipment and machinery as heretofore or hereafter amended.

Administrator prays judgment on behalf of the United States of America against the defendants and each of them in the sum of Fifty-six Thousand Four Hundred Sixty-seven Dollars and Thirty-eight Cents (\$56,467.38) on plaintiff's second Count; and for the further sum of Seven Thousand Six Hundred Seven Dollars and Nineteen Cents (\$7,607.19) on plaintiff's third Count.

Administrator prays for such other and further relief as to the Court may seem meet and proper.

McDANNELL BROWN

F. E. WAGNER

Attorneys for Plaintiff [4]

State of Oregon,
County of Multnomah—ss.

Due service of the within Amended Complaint is hereby accepted in Multnomah County, Portland, Oregon thisday of March, 1944, by receiving a copy thereof, duly certified to as such by F. E. Wagner, of Attorneys for Plaintiff.

/s/ ALBERT W. GENTNER

By C. LANG

Attorney for Defendants

[Endorsed]: Filed March 22, 1944. [5]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants above named and for answer to the amended complaint filed herein:

FIRST DEFENSE

1. Deny each and every allegation therein contained, save and except that defendants admit the terms of the Emergency Price Control Act of 1942 as amended, and admit that the Administrator of the Office of Price Administration issued what is known as Maximum Price Regulation No. 134, as amended.

SECOND DEFENSE

For a defense to the third count, defendants allege:

1. That on January 6, 1944, the defendants Henry A. Kuckenberg and Harriet A. Kuckenberg, pursuant to order of the Honorable Claude McCulloch, Judge of the above entitled court, appeared before F. E. Wagner, attorney for the plaintiff above named, at 1215 Bedell Building, Portland, Oregon, and after having refused to answer any questions or to produce any documents or other evidence on the ground that the answers to said questions or the production of said documents or other evidence might subject them, or any of the above defendants, to a penalty or forfeiture, did, under the compulsion of said order, testify under oath before said attorney for said plaintiff above

named to various questions propounded and asked by said attorney for said plaintiff and produced records requested by said attorney for said plaintiff pursuant to said order, and that the answers to [6] said questions and the records so produced are the basis for the said third count in this amended complaint; that said answers so given and said records so produced and turned over to said attorney for the plaintiff above named related to the rental of construction and road maintenance equipment and the prices charged therefor; that this is an action for a penalty or forfeiture; that pursuant to the provisions of Section 202-A of the Emergency Price Control Act of 1942 and the provisions of the Compulsory Testimony Act of February 11, 1893, the defendants are immune from prosecution for said penalty or forfeiture demanded in the third count herein.

Wherefore, having fully answered said amended complaint, defendants pray that said complaint be dismissed.

/s/ ALBERT W. GENTNER

Attorney for Defendants

Demand is hereby made for a trial by jury.

/s/ ALBERT W. GENTNER

Attorney for Defendants

State of Oregon,
County of Multnomah—ss.

I, Henry A. Kuckenberg, being first duly sworn depose and say that I am one of the defendants in the above entitled action; and that the foregoing Answer to Amended Complaint is true as I verily believe.

Subscribed and sworn to before me this
day of April, 1944.

.....

Notary Public for the State of Oregon. My Commission Expires July 15, 1945.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Answer to Amended Complaint by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 8th day of April, 1944.

/s/ F. E. WAGNER

Attorney for Plaintiff.

[Endorsed]: Filed April 8, 1944. [7]

—

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above matter came on for pre-trial on March 13, 1944, May 22, 1944, and June 12, 1944, before the Honorable Claude McColloch, Judge of the above entitled court, plaintiff appearing by F. E.

Wagner, one of his attorneys, and defendants appearing by defendant Henry A. Kuckenberg and by Albert W. Gentner, their attorney, whereupon the following statement of agreed facts was made, issues were settled and exhibits identified, to-wit:

AGREED FACTS

1. Plaintiff is Administrator of the Office of Price Administration.

2. Defendants are contractors who have been engaged in construction work and who have also been renting construction and road maintenance equipment.

3. Maximum Price Regulation No. 134, Amendment No. 3, became effective on October 22, 1942, and said Amendment No. 3 remained effective until July 1, 1943, at which time Amendment No. 9 became effective.

4. The defendants executed the contract entitled "Plaintiff's Exhibit 1" and received the payment voucher entitled "Plaintiff's Exhibit 2," but defendants do not admit the relevancy of either of said Exhibits or rentals made thereunder.

5. The contract dated November 30, 1942, known as "Defendants' Exhibit 24" was executed by the parties thereto, as was also the agreement [8] dated January 9, 1943, being "Defendants' Exhibit 25."

6. Defendants rented to A. J. Goerig Construction Co. on a fully operated basis tractors, carryalls, and a motor grader, during the months of December, 1942, and January, February, March and

April, 1943. Defendants rendered statements to A. J. Goerig Construction Co., for \$100,100.62 and have been paid \$94,501.80.

7. Defendants rented motor graders fully operated to Buckler Co. etc., in the months of January to July, inclusive, 1943, at the prices and for the number of hours shown in "Plaintiff's Exhibit 6."

8. Defendants rented motor graders fully operated and without driver, and tractors and carryalls fully operated to Lease and Leighland during May to December, inclusive, 1943, at the rates shown and for the hours specified in "Plaintiff's Exhibit 7."

9. This action was brought without any specific authorization from the Administrator of the Office of Price Administration and without the exercise of his discretion concerning this particular action, but the action was instituted on the sole discretion of McDannell Brown, Chief Enforcement Attorney, Portland District, of the Office of Price Administration.

PLAINTIFF'S CONTENTIONS

Plaintiff contends that the contract between Kaiser Co., Inc. and Kuckenberg Construction Co., being "Plaintiff's Exhibit 1," establishes a ceiling price as of March 31, 1942, for fully operated tractors of \$8.60 per hour, fully operated carryalls of \$2.00 per hour, and fully operated graders of \$7.60 per hour, and fully operated tractors and carryalls together of \$10.60 per hour.

Plaintiff contends that defendants rented to A. J. Goerig Construction Co., fully operated tractors at

\$9.00 per hour, fully operated carryalls at \$2.60 per hour, and fully operated graders at \$8.00 per hour, and charged \$2.00 per hour of tractor operation time for unusual wear and tear, by reason of which plaintiff claims an overcharge to A. J. Goerig Construction Co. of \$18,822.46. [9]

Plaintiff further contends that the defendants rented fully operated graders to Lease & Leigland at \$8.00 per hour and without operator at \$6.40 per hour, and fully operated tractors at \$9.09 per hour, and fully operated tractors and carryalls at \$11.60 per hour, by reason of which plaintiff claims an overcharge to Lease & Leighland of \$615.19.

Plaintiff further contends that defendants rented to Buckler Co. etc., fully operated graders at \$8.00 per hour, and by reason thereof claims an overcharge of \$1182.50.

Plaintiff concedes in connection with the A. J. Goerig Construction Co. claim that defendants are entitled to make a showing of actual expenditures on account of unusual wear and tear and admits that the amount of actual expenditures shown to have been made by defendants on account of unusual wear and tear in connection with the A. J. Goerig Construction Co. contract would be a proper offset to the amount claimed by the plaintiff to be an overcharge on the part of the defendants, the total amount of allowable offset, however, not to exceed the sum of \$13,784.50, this amount being the amount charged by defendants for unusual wear and tear at the rate of \$2.00 per hour which was in-

cluded in the previous figures as the amount charged by defendants to A. J. Goerig Construction Co.

Plaintiff contends that the authority to institute this action emanated from General Order No. 3, Revised General Order No. 3, Admin. Order No. 4, teletype June 4, 1943, and memorandum dated April 23, 1943.

Plaintiff contends that any objections by defendants to the rates as provided by Maximum Price Regulation 134 have been waived by said defendants' failure to exhaust their administrative remedies.

DEFENDANTS' CONTENTIONS

Defendants contend that there is no provision in the Regulation for the establishment as of March 31, 1942, of any fully operated rate, and contend that their prices are governed as to bare rental by the provisions of Amendment No. 3 M.P.R. 134, and as to operating and maintenance service by the terms of "Plaintiff's Exhibit No. 4," being letter dated February 5, 1943, [10] from the Office of Price Administration at Washington, D. C. to Kuckenberg Construction Co., with the exception of the price provided therein for diesel motor graders, as to which the defendants contend they are entitled to a rate of \$4.40 per hour instead of \$3.50 per hour, in that the allowance of a rate of \$3.50 per hour by letter from the Office of Price Administration in Washington, D. C., was in violation of Amendment No. 3, M.P.R. 134, which

provides for the allowance of a price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service. Defendants contend that the price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service would be \$4.40 per hour; that the maximum price as allowed by the Office of Price Administration to competitive suppliers of the same or similar service operating on the same job with defendants was the sum of \$4.40 per hour, one of said competitive suppliers having identical costs with defendants, and that refusal to allow a price of \$4.40 per hour is discriminatory and constitutes an arbitrary taking of property without due process of law.

Defendants further contend that the amount paid by the lessee of equipment governs as to whether there has been any violation of the Regulation and not the amount charged and not paid.

Defendants contend that both the amounts charged and the amounts received by defendants in all of the rentals specified by plaintiff were less than the rates allowed to the defendants by Amendment No. 3 M.P.R. 134.

Defendants further claim that the actual expenditures on account of unusual wear and tear in connection with the A. J. Goerig Construction Co. contract exceeded the amount charged or received at the rate of \$2.00 per hour for unusual wear and tear and that they are entitled to an offset for the full amount of the charge.

Defendants further claim that they are immune from prosecution for the penalties demanded from them on account of rentals to Lease & Leigland and Buckler Co. etc.

Defendants contend that this court lacks jurisdiction in the case for the reason that the bringing of this action was not authorized by the [11] plaintiff, but that this action was brought upon the sole authority and discretion of McDannell Brown, Chief Enforcement Attorney at Portland, Oregon, and without the exercise of any discretion by the Administrator of OPA, and on the further ground that the plaintiff was not authorized to delegate to any other person his discretionary power to bring this action, and particularly to said Chief Enforcement Attorney, and that the plaintiff did not in fact delegate or attempt to delegate said authority and discretion to said Chief Enforcement Attorney.

Defendants contend that they offered to plaintiff in good faith to refund to any lessee of equipment any amount which should be found to be a charge in excess of the bare rental charge as established by Amendment No. 3, M.P.R. 134, or the charge for operating and maintenance service allowed by said letter of February 5, 1943, in consideration of the dismissal of this action and that said offer was rejected.

Defendants further contend that the plaintiff granted this privilege to competitors and that refusal to grant said privilege to defendants is arbi-

trary, unreasonable, capricious and oppressive, and violates the Fifth Amendment of the Constitution of the United States.

Defendants do not admit any violation of the regulation but if any violation be established defendants content that such violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation.

[12]

PRE-TRIAL EXHIBITS

Plaintiff's:

1. Contract between Kaiser Company, Inc., Contractor, and Kuckenberg Construction Co., Subcontractor, etc.,

2. Certified copy of payment voucher dated April 18, 1942, payable to Kuckenberg Construction Company, with papers attached.

Execution of these two Exhibits admitted by defendants but relevancy denied.

3. Letter dated January 5, 1943, Kuckenberg Construction Company to Construction and Road Maintenance Equipment Board, OPA, Washington, D. C.

4. Letter dated February 5, 1943, Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, OPA.

Exhibits 3 and 4 admitted in evidence without objection.

5. Statement, 3 sheets, first headed "Kuckenberg Rentals to A. J. Goerig Const. Co. March 10, 1944."

6. Statement, 2 sheets, first headed "Kuckenberg Rentals to Buckler Company, etc. Andrew Lee Rapp 3-16-44."

7. Statement, 2 sheets, first headed "Kuckenberg Rentals to Lease & Leigland. Andrew Lee Rapp, March 20, 1944."

Defendants admit correctness of rates charged to lessees of equipment and of dates and hours of rentals but deny relevancy of the computations and of the Exhibits themselves.

The following un-numbered Plaintiff's Exhibits were also offered and received in evidence as a part of the record on behalf of the plaintiff.

(a) General Order No. 3 (as amended on October 2 and November 26, 1942) (7 F.R. 7910, 9909)

(b) Revised General Order No. 3 (8 F.R. 8027) as issued by the Administrator on June 10, 1943.

(c) Administrative Order No. 4, Part I, Supplement 7 (OPA Surveys, p. 1; 576 (c) issued by the present Administrator on December 29, 1943.)

(d) Teletype of June 4, 1943, from Regional Enforcement Attorney for the 8th Region to District Enforcement Attorney for the Portland District.

(e) Memorandum dated April 23, 1943. [13]

Defendants'

8. Statement headed "Cost Summary—A. J. Goerig Construction Co., Bremerton Airport Rental of Equipment"

9. Statement headed "Portland Payroll Totals—December 12, 1942, to June 19, 1943"

10. Statement dated April 30, 1943, addressed to A. J. Goerig Construction Company and headed "Hauling Charges"

11. Statement headed "Summary of Invoices", 3 typewritten sheets

Plaintiff objects to introduction of Defendants' Exhibits 8, 9, 10 and 11 and demands proof at the time of trial.

12. Statement dated October 19, 1943, signed Henry A. Kuckenberg and addressed to Prentiss M. Brown, Price Administrator, etc.

13. Statement dated January 6, 1944, signed Harriet A. Kuckenberg and addressed to Chester Bowles, Administrator of the Office of Price Administration, etc.

14. Statement dated January 6, 1944, signed Henry A. Kuckenberg, addressed to Chester Bowles, Administrator of Office of Price Administration, etc.

Plaintiff admits Exhibits 12, 13 and 14 were received by plaintiff.

15. Letter, May 5, 1944, Kuckenberg Construction Co., to Walter Schoemaker, OPA, Washington, D. C.

16. Letter, May 19, 1944, Kuckenberg Construction Co. to Walter Shoemaker, OPA, Washington, D. C.

17. Letter, May 24, 1944, Walter Shoemaker, Head Construction and Extraction Equipment Sec-

tion, Machinery Branch, to Kuckenberg Construction Company.

18. Letter, June 1, 1944, Kuckenberg Construction Co. to Walter Shoemaker, Head Construction and Extraction Equipment Section, etc.

Plaintiff admits the originals of Exhibits 15, 16 and 18 are in possession of plaintiff and that no objection will be raised because said Exhibits are copies, but denies relevancy of Exhibits.

Plaintiff admits authenticity of Exhibit 17 but denies relevancy. [14]

19a to 19-e Photostatic copies of five letters, OPA correspondence

20. Photostatic copies, etc. of correspondence with OPA, 17 pages marked 20-a to 20q, both inclusive.

Plaintiff admits authenticity of letters from Office of Price Administration at Washington, D. C., and as to photostatic copies of carbon copies of letters to the Office of Price Administration in Washington, D. C., that the originals are in the possession of the plaintiff, and that no objection is offered by plaintiff by reason of the fact that photostatic copies of carbon copies are offered, but the relevancy of all of said Exhibits is denied by plaintiff, all objections other than as to relevancy being waived and no further proof of authenticity being required.

21. Document dated March 9, 1944, headed "Sold to A. J. Goerig Construction Company",

"Summary of Equipment Possession by Lessee for OPA Regulation #134 Rental Basis", 15 sheets

22. Computations as to various Buckler companies and Lease & Leighland

23. Statement headed "Hourly Rate Analysis—Bare Rental—Kuckenberg-Goerig Rental, 1942-1943"

Plaintiff objects to admission of these Exhibits and demands proof

24. Contract dated November 30, 1942, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company, accepted by A. J. Goerig Construction Co. and G. W. Walch

25. Agreement dated January 9, 1943, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, Addressed to A. J. Goerig Construction Company, accepted by A. J. Goerig Construction Co. and G. W. Walch.

Plaintiff admits execution of said contracts.

26. Statement headed "Bremerton Airport—Kitsap County, A. J. Goerig Contract. Recap.-Repairs Bremerton Tractors", etc., 12 sheets

Plaintiff objects to admission in evidence and demands proof.

27. Photograph of "Caterpillar" Diesel D8 Tractor

Received in evidence without objection.

28, 29, 30 Three photographs of Tractors and Carryalls

Plaintiff denies relevancy but does not require further authentication [15]

31. Requisitions from George H. Buckler, Contractor, to Kuckenberg Construction Company, 20 sheets, numbered 1 to 29, both inclusive.

Received in evidence.

Defendants' Answer to Amended Complaint is deemed to be amended to include all of defendants' contentions as hereinbefore set forth.

The foregoing Pre-Trial Order is hereby settled this 14th day of November, 1944.

CLAUDE McCOLLOCH

United States District Judge

F. E. WAGNER

Of Attorneys for Plaintiff

ALBERT W. GENTNER

Of Attorneys for Defendants

[Endorsed]: Filed Nov. 14, 1944. [16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause come on for trial on the 14th day of November, 1944, before the Hon. Claude McCulloch, Judge of the above court, plaintiff appearing by F. E. Wagner, his attorney, and defendants appearing by Henry Kuckenberg and Lawrence Kuckenberg in person and by Albert W. Bentner, their attorney, and the parties having offered evi-

dence and settled upon a pre-trial order, which was signed by the attorneys for both parties and which pre-trial order was signed by the Court and entered herein, and said attorneys having argued and submitted the cause to the Court, the Court now makes the following

FINDINGS OF FACT

I.

The bringing of this action was not authorized by the named plaintiff, but it was brought on the sole authority of the Chief Enforcement attorney of the Office of Price Administration at Portland, Oregon, and without the exercise of any discretion by the named plaintiff.

II.

The only attempted delegation of the authority of the named plaintiff to the Chief Enforcement Attorney of the Office of Price Administration at Portland, Oregon, was made by the Regional Attorney of the [17] Office of Price Administration at San Francisco, California, at a time prior to the date of the only order issued by the named plaintiff purporting to authorize Regional Attorneys to redelegate the authority and discretion of the named plaintiff to bring actions for treble damages against alleged violators of the Emergency Price Control Act.

III.

Defendants do not have and did not have any established ceiling price as of March 31, 1942, for

fully operated tractors, fully operated carry-alls, fully operated graders or fully operated tractors and carry-alls together. Defendants were advised by the Office of Price Administration at Washington, D. C., in a letter dated February 5, 1943, that Section 1399.7 of Maximum Price Regulation No. 134 operated to prevent any establishment of a fully operated rate.

IV.

Plaintiff offered no evidence of any violation by the defendants of Maximum Price Regulation No. 134, As Amended—Construction and Road Maintenance Equipment Rental Prices and Operating or Maintenance Service Charges (hereinafter designated as M P R 134), either during the period that Amendment No. 3 was effective or thereafter during the period in which Amendment No. 9 was effective.

V.

Kuckenberg Construction Company had no established charge in effect on March 31, 1942, for any operating and maintenance service. The Office of Price Administration at Washington, D. C., treated, confirmed and acted upon the letter of Kuckenberg Construction Company of January 5, 1943, as a report pursuant to Sub-paragraph Two of Section 1399.6(b) of said M P R 134, and approved the following maximum charges for operating and maintenance services as charges determined upon the basis of labor rates in effect on March 31, 1942, material prices in effect on that date (not exceeding practi-

cable maximum prices therefor), computed by a method appropriate to the service to be rendered and resulting in prices bearing a normal relation to the maximum price of a competitive supplier of the same or similar service, to-wit: [18]

Crawler Diesel Tractor 89-130 H. D.

with Lights 4 Drum Power Unit \$4.30 per hour

Crawler Diesel Tractor 89-130 H. P.

with Angle Dozer or Bulldozer 4.40 per hour

Crawler Diesel Tractor 89-130 H. P.

with Scraper 4.90 per hour

Diesel Grader All Wheel Drive and

Steer 3.55 per hour

Diesel Grader (Heavy Duty) Cater-

pillar Model 12) 3.75 per hour

VI.

All construction and road maintenance equipment involved in this suit and concerning which evidence was introduced by the plaintiff was leased by Kuckenberg Construction Company to A. J. Goerig Construction Co., to Buckler Co., etc., and to Lease & Leigland on a "fully operated" basis. The Court finds that the consideration therefor did not exceed the aggregate of the maximum rental price provided by M P R 134 for such equipment and the maximum charge provided by M P R 134 for operating and maintenance services furnished by the defendants, and the Court further finds that in determining whether said consideration did or did not exceed said aggregate, the same method of figuring said prices and said charges was used by defendants

as was employed by the Oregon Transfer Co., a competitive lessor of construction and road maintenance equipment, and that said method was suggested by the Office of Price Administration at Portland, Oregon, and approved by the Office of Price Administration at Washington, D. C., and at Portland, Oregon. (See conclusion of law 4a *infra*) CMc.

VII.

Soil conditions and operating conditions at the Airport in Kitsap County near Bremerton, Washington, were misrepresented by A. J. Goerig Construction Co. to Kuckenberg Construction Company to induce [19] Kuckenberg Construction Company to enter into the contract dated November 30, 1942, for the leasing of construction and road maintenance equipment. That material encountered due to soil conditions and operating conditions was such that far greater than ordinary and usual wear and tear on the equipment resulted. To prevent Kuckenberg Construction Company removing said equipment A. J. Goerig Construction Co. agreed to pay \$2.00 per hour for tractor operating time to cover unusual wear and tear upon said equipment. That A. J. Goerig Construction Co. paid Kuckenberg Construction Company \$13,784.50 under said agreement. That actual expenditures of Kuckenberg Construction Company on account of unusual and extraordinary wear and tear and breakages due to said soil conditions and operating conditions and abuse of the equipment by A. J. Goerig Construction Co. amounted to \$33,562.36. Before entering

into said agreement for payment of \$2.00 per hour defendants consulted the Office of Price Administration at Portland, Oregon, and were advised by said Office of Price Administration at Portland, Oregon, that payment for unusual wear and tear should be covered by agreement between the parties and when so contracted for, was a proper charge. Plaintiff has conceded that the amount of actual expenditures by Kuckenberg Construction Company on account of unusual wear and tear would be a proper offset to the amount claimed by the plaintiff to be an overcharge by defendants, to the extent of \$13,784.50.

VIII.

Defendants have proved to the satisfaction of the Court that they acted in good faith in making the charges they did for rental of equipment and furnishing of operating and maintenance services and for the repair of damage caused by unusual wear and tear and breakages and if any of said charges constituted any violation of the Emergency Price Control Act of 1942 or of M P R 134 said violation was neither wilful [20] nor the result of failure to take practicable precautions against the occurrence of the violation.

Based on the pre-trial order herein and the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

This action was brought by the Chief Enforcement Attorney of the Office of Price Administration at Portland, Oregon, on his sole discretion and authority without authority from the named plaintiff and without the exercise of any discretion on the part of the named plaintiff and was therefore unauthorized.

II.

M P R 134 does not provide for the establishment of a fully operated rate as of March 31, 1942, for any construction or road maintenance equipment, and any leasing or rental of construction or road maintenance equipment on a fully operated basis on March 31, 1942, does not operate to establish said fully operated rate as a ceiling price upon which any claimed violation of M P R 134 may be based.

III.

That defendants were entitled to charge A. J. Goerig Construction Co. \$2.00 per hour for tractor operating time for unusual wear and tear and that the charge of \$13,784.50 made by defendants was a proper charge for unusual wear and tear.

IV.

That defendants are entitled to offset actual expenditures for unusual wear and tear to the amount of \$13,784.50 against any amount claimed by plaintiff to be an overcharge in connection with the A. J. Goerig Constructions Co. contract.

IVa.

Different interpretations of the applicable regulations being possible the court feels that it is entitled to adopt the interpretation adopted and employed by the administrative agency in dealing with defendants' competitors (see finding of fact VI supra) CMc. [21]

V.

That defendants did not violate the Emergency Price Control Act of 1942 or M P R 134 issued thereunder.

VI.

Defendants are entitled to a judgment that this action be dismissed.

CLAUDE McCOLLOCH

United States District Judge

Dated November 25, 1944.

State of Oregon,

County of Multnomah—ss.

Service of the foregoing Findings of Fact and Conclusions of Law by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 22nd day of November, 1944.

F. E. WAGNER

Attorney for Plaintiff

[Endorsed]: Filed Nov. 25, 1944.

In the District Court of the United States
for the District of Oregon

Civil No. 2290

CHESTER BOWLES, Administrator,
Office of Price Administration,
Plaintiff,
vs.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG AND HARRIET A. KUCK-
ENBERG, Co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,
Defendants.

JUDGMENT OF DISMISSAL

The above cause came on for trial on the 14th day of November, 1944, before the Hon. Claude McColloch, Judge of the above court, plaintiff appearing by F. E. Wagner, his attorney, and defendants appearing by Henry Kuckenberg and Lawrence Kuckenberg in person and by Albert W. Gentner, their attorney, and the parties having offered evidence and settled upon a pre-trial order, which was signed by the attorneys for both parties and which pre-trial order was signed by the Court and entered herein, and said attorneys having argued and submitted the cause to the Court, and the Court having heretofore made Findings of Fact and Conclusions of Law in favor of defendants,

Now, Therefore, based on said Findings of Fact and Conclusions of Law,

It Is Hereby Ordered and Adjudged that this action be and the same is hereby dismissed.

Dated this 25th day of November, 1944.

CLAUDE McCOLLOCH

United States District Judge.

State of Oregon,

County of Multnomah—ss.

Service of the foregoing Judgment of Dismissal by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 22nd day of November, 1944.

F. E. WAGNER

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 25, 1944. [23]

[Title of District Court and Cause.]

ORDER TO FORWARD EXHIBITS

It appearing necessary that the original exhibit in the above described cause accompany the transcript of record upon appeal to the Circuit Court of Appeals for the Ninth Circuit,

It Is Ordered that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all original exhibits introduced in evidence in this cause.

Dated at Portland, Oregon, this 23rd day of March, 1945.

/s/ CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed March 23, 1945. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Henry A. Kuckenberg, Lawrence W. Kuckenberg and Harriet A. Kuckenberg, Defendants
Above Named, and to Albert W. Gentner, their
Attorney.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment dismissing said action, made and entered in the above entitled action on the 25th day of November, 1944.

Dated at Portland, Oregon this 23rd day of February, 1945.

/s/ F. E. WAGNER

/s/ W. DUNLAP CANNON, JR.

Attorneys for Appellant

Chester Bowles,

Administrator

[Endorsed]: Filed Feb. 23, 1945. [25]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Plaintiff Appellant Chester Bowles, Administrator, Office of Price Administration, hereby designates for inclusion in the record on appeal taken by appellant from the final judgment herein the complete record and all the proceedings and evidence in the action including, without limitation, the following:

1. Amended Complaint
2. Answer to Amended Complaint
3. Pre-trial Order
4. Findings of Fact and Conclusions of Law
5. Judgment of Dismissal
6. Transcript of Pre-trial Conference, March 13, May 22 and June 12, 1944
7. Transcript of Trial Proceedings, November 14, 1944
9. Notice of Appeal
10. This Designation
11. Order to Forward Exhibits

Dated at Portland, Oregon, this 21st day of March, 1945.

/s/ F. E. WAGNER

Of Attorneys for Plaintiff
Appellant [26]

State of Oregon

County of Multnomah—ss.

Due service of the foregoing Designation of Record is hereby accepted in Portland, Multnomah County, Oregon this 22 day of March, 1945, by receiving a duly certified copy thereof.

/s/ ALBERT W. GENTNER

Of Attorneys for Defendants

[Endorsed]: Filed March 23, 1945. [27]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 and 28 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 2290, in which Chester Bowles, Administrator, Office of Price Administration, is Plaintiff and Appellant, and Henry A. Kuckenberg, Lawrence W. Kuckenberg and Harriet A. Kuckenberg, co-partners doing business under the assumed name of Kuckenberg Construction Company, are defendants and appellees; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in

accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover duplicate transcript of Trial Proceedings filed in this cause together with exhibits Nos. 1 to 35 inclusive.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 30th day of March, 1945.

[Seal]

LOWELL MUNDORFF,

Clerk.

By F. L. BUCK

Chief Deputy. [28]

In the District Court of the United States
for the District of Oregon

Civil No. 2290

CHESTER, BOWLES, Administrator,
Office of Price Administration

Plaintiff

vs.

HENRY A. KUCKENBERG et al.

Defendants

Portland, Oregon, March 13, 1944.

Before:

Honorable Claude McColloch, Judge.

Appearances:

F. E. Wagner, Esq., appearing on behalf of
the plaintiff.

A. W. Gentner, Esq., and John K. Crowe, Esq.,
appearing on behalf of defendants.

Court Reporter:

Ira G. Holcomb.

PROCEEDINGS OF PRE-TRIAL
CONFERENCE

Mr. Wagner: This case is set for trial tomorrow, your Honor.

The Court: I have some questions I want to ask, but I will wait.

Mr. Wagner: In connection with some of plaintiff's evidence, one witness employed at the Kaiser Company at Vancouver, had, or has, in his posses-

sion certain documents which the plaintiff, in the event of the question becoming an issue, would like to have subpoenaed. The time is not very long, and if there is any question about the evidence that he has, or what it will show, we would like very much to have an order for a subpoena duces tecum issued this morning. We will develop that a little later on.

At the outset, your Honor, it is the position of the plaintiff that the transactions involved here are the subject of Amendment 3 of the Regulations, which I believe are somewhat different in content and substance than the regulation which is set forth in the copy heretofore given the Court; and we would like very much to supply the Court with a copy, also counsel.

At issue, according to the pleadings, are all the allegations of the complaint.

Paragraph 1 sets forth the application or the applicable provisions of the Price Control Act, and it would seem to me that there should be no denial as to its application.

Paragraph 2 is an allegation relative to the jurisdiction of the Court in the matter.

Paragraph 3 refers to the particular Price Regulations involved.

I submit to your Honor, and to counsel, that Price Regulation 134 became effective May 11, 1942, recorded in 7th [2*] Federal Register 971.

Mr. Gentner: That is the original—

*Page numbering appearing at top of page of original certified Transcript.

Mr. Wagner: That is the original date of the regulation, May 11, 1942. Amendment 1 became effective the same day, and it covered some typographical errors.

Amendment 2 of the Regulations became effective September 8, 1942. It was recorded in 7th Federal Register 3203, and it pertains to the rental of this type of equipment in the State of Michigan, which, of course, does not apply here.

Amendment 3, which is the one we think is involved here became effective October 22, 1942, and was recorded in 7th Federal Register 7871.

All in all, there are fourteen amendments to this Regulation. There are some that became effective at a later date, particularly Amendment 9 which became effective July 1, 1943 which, in some respects, qualifies the issues here involved in Amendment 3. All of the other amendments, I believe, are not relevant and not applicable at all. Some of them cover certain types of rental in Alaska for work that is being done on the Alcan Highway and other projects, and certain allowances were made on these contracts because of the difficult terrain and the transportation item involved. The other amendments really have no application to the issues involved here at all.

In this Regulation, it is the position of the plaintiff [3] that the particular provisions which are applicable are 1399.1.

Mr. Gentner: Just a minute. Let me get that. All right.

Mr. Wagner: That is on page 2 of this amendment. Also, 1399.6, the first section. 1399.1 is the prohibition against the renting of supplies and services at higher than the maximum prices. It has various sub-sections, and, in connection with operating and maintenance services, refers indirectly to 1399.6, which provides the maximum charges for operating and maintenance services. Section "A" is the applicable provision. In substance, that section provides——

Mr. Gentner: That is, Section "A" of 1399.6?

Mr. Wagner: That is right. In substance, that provision provides where a lessor of this type of equipment had established charges in effect during March, or in effect on the 31st of March, 1942, those would be his maximum prices in subsequent transactions. This sub-section also provided or required that such lessor file his established charges on or before November 2, 1942.

To clarify somewhat the rental on the basis of the Regulation, there are two types of rental. One is bare rental; that is, rental covering only the equipment itself. The other is operating and maintenance, or the rental of equipment covering the operating and maintenance of it. That would be a stipulated [4] rental rate for the gasoline, oil, labor and wages of the operator, and possibly some other items.

It is our position that in this particular matter the defendants had, on March 31, 1942, established a rental rate which consisted of or which was based upon two contracts which existed, one that the

Kuckenberg Construction Company had with the Oregon Shipbuilding Corporation, and the other with the Kaiser Company of Vancouver. Those contracts were in effect during the month of March, and the defendants billed both of those corporations for operating and maintenance, together with the bare rental, for services furnished during the month of March.

The violations which are the basis of this complaint consist of a contract between the Kuckenberg Construction Company and the Goerig Construction Company of Seattle, Washington, which became effective in November, I believe, and involved services and rental for the months of December, January, February and March, and, I believe, some in April of 1943. Those rates that were charged the Goerig Construction Company were substantially higher than the base rates that the defendants were required to use, according to the provisions of this Regulation. The difference between those rates amounts to \$18,822.46.

That figure is somewhat different than the Plaintiff originally alleged in its complaint, your Honor, and the allegation or the prayer concerning the amount should be charged accordingly. [5]

There is also at issue, in connection with services and rentals furnished to the Goerig Company at a later date, the question of extraordinary wear and tear due to unusual working conditions on the job. Just exactly what the position of the defendants will be, or is, in connection with that question, I do not know.

It is our position that, before the defendants would be permitted to make a charge for extraordinary wear and tear, it would be necessary for them to establish that there actually was extraordinary wear and tear, and also show what the extent of it was.

The Regulation in that connection provides—and I think very logically—It does not specifically provide anything for extraordinary wear and tear, but it contains a provision that the equipment shall be returned to the lessor in substantially the same condition as it was upon its delivery to the lessee. I believe a reasonable interpretation of that would mean that any repairs that were necessitated to the equipment would be the responsibility of the lessor, but any repairs due to negligence in the operation of the equipment on the part of the lessee or possibly accidental breakage involving extraordinary wear and tear, such as in this particular case which involved the construction of certain revetments, which necessitated the equipment being used in a peculiar and different manner—in turning the equipment around these re- [6] vetments it did cause a certain amount of rock or gravel to pile up and fall into the rollers, and in that way naturally there would be extraordinary wear and tear, and we have no objection to the defendants claiming that and coming in and mitigating the Administrator's claim on the basis of extraordinary wear and tear, but we do feel that they should justify the claim that they might have in that connection by adequate and very convincing evidence.

Mr. Gentner: I would like to ask you to clarify that, if you will. Is it your position that we would be bound to furnish evidence of the actual amount that had been paid out for this wear and tear?

Mr. Wagner: For extraordinary wear and tear. Ordinary wear and tear would naturally be included in the bare rental.

Mr. Gentner: Yes, but I mean on this unusual wear and tear, it would be the actual amount that we paid out, is that the criterion?

Mr. Wagner: I think so. I think that would be the most that would be reasonably allowed.

Mr. Gentner: Is that the basis you want us to proceed to prove—What I am trying to find out, your Honor is just what we have to meet here, and what evidence we should present. What I am trying to find out is the basis on which the Administrator would be prepared to allow mitigation would be the basis of the actual amount paid out on account of unusual wear and tear on these items.

Mr. Wagner: That would seem to me to be logical, yes, unless [7] you differ in your interpretation of the regulations.

Mr. Gentner: No, I think that is right, Mr. Wagner. I think that is proper and that is what should be applied.

Mr. Wagner: The other feature of this case, your Honor, is the injunction—

Mr. Gentner: Might I ask you, before you proceed with that: You have given the figure of \$18,822, and you made the statement that there was

an established charge in effect by virtue of some contracts.

Could you state, or would you state what that charge was, so that we might know just where we stand? What do you claim—what charge do you claim? I think you mentioned two contracts. Which one of them has a different figure in it?

Mr. Wagner: The contract in effect with the Kaiser Company of Vancouver.

Mr. Gentner: The Kaiser Company of Vancouver?

Mr. Wagner: That contract, I believe, provided for a rate on the large type of tractor of \$10.60; that is, for the D-8's. The rates for the D-7's under that contract, I believe, were \$8.60——

Mr. Gentner: There were no D-7's on that job.

Mr. Wagner: At Vancouver?

Mr. Gentner: No, I mean on this other.

Mr. Wagner: On the Goerig job. I think you are right. The rate that was charged by Mr. Kuckenberg on the Goerig job on the wholly operated basis was, I believe, \$11.60, plus \$2 for extraordinary wear and tear, or \$13.60, a difference of \$3 an hour.

Mr. Gentner: Do you have the other rates, too, the rates on carryalls, and so forth?

Mr. Wagner: On the carry-alls, the March 1942 rates were \$2.00.

Mr. Gentner: That is, the Kaiser contract.

Mr. Wagner: I believe so; and on the Goerig job, the carry-alls took a rate of \$2.60.

Mr. Gentner: Is there a combined rate for tractor and carry-all on the Kaiser operation?

Mr. Wagner: I believe, in some instances, there is.

Mr. Gentner: What is that rate?

Mr. Wagner: \$10.60. I believe that is the \$10.60 rate.

Mr. Gentner: That is for the tractor alone, I believe.

Mr. Wagner: \$10.60 would be the combined rate.

Mr. Gentner: The carry-all and tractor?

Mr. Wagner: Yes. The tractor rate is \$8.60, and the combined rate is \$10.60.

Mr. Gentner: This figure of \$18,822.46, that represents the difference between the amount paid or the amount charged? Which? the figure here that you have given on the Vancouver work, irrespective of the \$2.00——

Mr. Wagner: Our position is, whether it is paid or charged, is immaterial. [9]

Mr. Gentner: Would be a difference of some \$5000. I wondered on which basis you figured that.

Mr. Wagner: Either. I mean, the fact that the money has not been paid would make no difference.

Mr. Gentner: Wouldn't know whether this was figured on the charge or the money paid.

Mr. Wagner: Apparently on the charge.

Mr. Gentner: On the charge?

Mr. Wagner: Yes.

Mr. Gentner: And that does not take into consideration this extra \$2, or does it figure that in?

Mr. Wagner: That does take it in. \$18,822.46.

Mr. Gentner: Let's see if I get this right. The \$18,822.46 includes the \$2 charge?

Mr. Wagner: That is right.

Mr. Gentner: So that this was figured on a charge of \$13.60 in order to arrive at this amount, is that right?

Mr. Wagner: That is right.

Mr. Gentner: That is on the tractors only?

Mr. Wagner: The tractors and carry-alls.

Mr. Gentner: Do you have any computation you are going to submit?

Mr. Wagner: We are going to submit everything we have.

Mr. Gentner: You have a computation that shows that?

Mr. Wagner: Yes. [10]

Mr. Gentner: I did not mean to interrupt you. It just occurred to me at that time, and I wanted to ask those questions.

Mr. Wagner: In connection with the injunction feature of the complaint, the allegation includes—the allegation of violation includes only the dates of the 3rd day of December, 1942 to and including the 30th day of March, 1943. Those violations are somewhat stale, and it might be that the Court would desire more recent violations to be submitted before considering the issuance of an injunction. In the other matter pending, which was discussed this morning, the violations are more recent, some of them I believe very nearly current; and, if the Court desires to proceed in that manner, we would

very willingly let the matter of the injunction go until the hearing of that case.

In conclusion, your Honor, the evidence of the plaintiff consists of an original duplicate of a contract dated February 9, 1942, together with change orders——

Mr. Gentner: February 9th?

Mr. Wagner: February 9th. ——between the Kaiser company.

Mr. Gentner: Oh, yes.

Mr. Wagner: Between the Kaiser Company of Vancouver and the Kuckenberg Construction Company; also progress estimates, with the billings under that contract made by the Kuckenberg Construction Company for the period of time March 1, 1942 to March 31, 1942, together with certified invoices and also payment voucher No. 120 [11] drawn on the Clark County National Bank of Vancouver, payable to the Kuckenberg Construction Company, drawn by the Kaiser Company, dated April 18, 1942, in the sum of \$16,089.02, which is payment for this progress estimate. Also——

The Court: I do not see why you make two or three cases. I don't see why you do not make just one case out of your complaints against this particular defendant. You said you want me to hear in this case evidence of these other cases to justify an injunction.

Mr. Wagner: I have no objection, your Honor, none whatsoever. It so happened that during the discovery proceedings, violations were known to have existed, and the period of limitations within

which the Administrator was required to act was drawing very close. That was the reason for filing the complaint at that time. We have no objection to a consolidation of the cases, if the Court would desire it done.

There is a question which was first brought up by the defendant in connection with the discovery proceedings, as to whether or not they had gained immunity under the statute by claiming privilege under the compulsory testimony act. That question has not yet been raised in this particular case, but, other than that, there is no difference in the cases, and also the fact that the transactions involve different concerns, there is no difference in the cases, and we have no objection to a consolidation of the cases whatsoever. [12]

Mr. Gentner: Of course, the other case has not even been filed yet. We could not proceed to trial tomorrow if they were consolidated.

The Court: Certainly not.

Mr. Gentner: There is another point, your Honor——

The Court: Of course, you could not go to trial tomorrow.

Mr. Gentner: There is another point, your Honor. In this complaint, which was the only thing we had to answer, it alleges transactions with the Goerig Construction Company, a Washington corporation. I feel it was necessary to deny that paragraph. We have had no transaction whatsoever, or at all, with the Goerig Construction Company, a Washington corporation. We did have some deal-

ings with an individual by the name of A. J. Goerig, who operated under the name of the Goerig Construction Company, but, as I understand, the Goerig Construction Company, a Washington corporation, is entirely out of existence, and that A. J. Goerig, the man with whom we had our dealings, had a connection with the Goerig Construction Company, a Washington corporation. I had no other alternative than to deny as to any transactions with this corporation. We rented no equipment to this corporation, which is a different set-up entirely from the person that we did have dealings with.

Mr. Wagner: That is right, your Honor. I think it is an immaterial error. In the complaint, we do allege the Goerig Construction Company is a Washington corporation. However, we have [13] been informed since that it is a partnership.

Mr. Gentner: Our information, at least, is that Goerig held himself out as an individual, and he signed the bond and contract for this job as an individual.

Mr. Wagner: I do not see that it makes any material difference at all, whether the transactions were with an individual, a partnership or a corporation; nevertheless, the payments were made, and I do not see how anybody else can be misled or prejudiced by that allegation in the complaint.

The Court: You have to make the formal chances, of course. How many more cases are you going to have against these people?

Mr. Wagner: I hope, none. I hope, not any more, your Honor.

Mr. Gentner: That satisfies us.

The Court: I don't think you need an order permitting you to file any complaint. I have not read the statute closely. I think we ought to try all charges against your client at one time, Mr. Gentner. I do not see any point in going to trial tomorrow, when we will have to try the same thing over again in two or three weeks from now, or two or three months from now.

Mr. Gentner: Then, he will file his complaint, and then we will proceed.

The Court: I guess he is going to.

Mr. Gentner: Then, this hearing will be postponed until the other comes up? [14]

The Court: That is my view of it.

Mr. Gentner: Yes.

The Court: I think all the cases, if they have a close relation from the Government's point of view, should be consolidated and tried at one time.

I would like to hear you on your demand for a jury,—what your ideas are about that.

Preliminary to that, this penalty of treble damages, Mr. Wagner, how does that work in this case? Does that work like in timber trespass cases where a bright jury fixes the value of the actual timber, and then the verdict is multiplied?

Mr. Wagner: My understanding of the statute is that the statute specifically requires that—

The Court: You are talking of timber cases?

Mr. Wagner: Yes. There is no such provision

in the Price Control Act, I believe, that after the establishment of a violation it requires the entry of a judgment for three times the amount involved.

The Court: What has been going on in the rest of the country about that in connection with all of these big cases that we read about that have been filed, where they have run into very large sums, where treble damages have been sustained?

Mr. Wagner: The Supreme Court has not considered [15] the matter.

The Court: Have any of those gone to final judgment in the District Courts anywhere?

Mr. Wagner: I am quite sure, your Honor, that they have.

The Court: Do you have some—

Mr. Wagner: I do not have anything I can cite right now, your Honor, but I will be very glad to review that point for you in a memorandum or otherwise.

The Court: Do you know of any cases that have gone to final judgment, Mr. Gentner?

Mr. Gentner: I do not know of any now, your Honor, either. Of course, it is a very new proposition and, as Mr. Wagner pointed out, there have been repeated amendments of the Act. There was another amendment in July, 1943 that again changes the complexion of this matter.

Your Honor, as I pointed out, we really do not know how to answer the complaint, the way it is now. We had no dealings with the parties set forth in this complaint. I cannot very well answer some complaint, when we had no dealings with the

parties mentioned. I have no way of answering this, except to say that we did not have any dealings with this corporation, which is an entirely different entity from the one which we did have dealings with.

Mr. Wagner: If the Court please, in view of the Court's [16] observation in connection with these matters, I believe the most expeditious manner in which to handle the case would be to file an amended complaint, at which time I will take care of that error. But I would like to add, in connection with the matter of treble damages, the treble damage feature that the Court was making inquiry about, it has been the position of the Administrator, I believe, in all of these proceedings that the treble damage claim is not one for a penalty; but that it is a damage claim. The statute specifically uses the word "damage" in there, and Congress has indicated what the measure of damages is. A violation of price regulations would have a tendency to cause inflation, and then, naturally, it causes damage. Just exactly the extent of that damage is very difficult to ascertain. It is impossible to ascertain in a great many instances, or it is in most instances. Therefore, Congress, in enacting this statute, fixed as the measure of damages the three times proposition.

The Court: What do you do with that money, if you get it?

Mr. Wagner: It goes directly to the United States Treasury, your Honor. Of course, that is where the money came from originally,—for ex-

ample this operation involving the construction of an airport near Bremerton, Washington. It was an Army airport. The United States Government supplied the original consideration. [17]

The Court: That is the kind of an argument I heard here Saturday. You finally met yourself coming back. Excuse me. Go ahead.

Mr. Gentner: Mr. Wagner, however, your contract with Goerig was already signed before our contract to rent the machinery and equipment was signed, so you cannot say it bears upon or covers the set-up in connection with any dealings of the Kuckenberg Company, can you?

The Court: All right, gentlemen.

Mr. Gentner: Mr. Wagner, you have a computation there that you were going to submit?

Mr. Wagner: Yes.

Mr. Gentner: While this matter is postponed, we might look this over, and perhaps we might agree on that figure, somehow or other.

Mr. Wagner: Very well.

Mr. Gentner: There is one other point, of course. In combining these cases, there may be some question of limitations raised, and we want it understood our rights in that regard will be protected in connection with the combining of the cases. There is a one-year statute of limitations on these suits.

The Court: I wouldn't think you would lose anything or gain anything by the consolidation. You do not have to consent to the consolidation. I am authorized under the rules [18] to consolidate on my own motion.

Mr. Gentner: Very well.

The Court: To make your record better, you do not need to get in the position of consenting.

Mr. Gentner: Very well.

(Thereupon, the proceedings had in the above entitled cause on, to wit, March 13, 1944, were concluded.) [19]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Ira G. Holcomb, hereby certify that on, to wit, March 13, 1944, I reported in shorthand the proceedings of the pre-trial conference had in the above entitled cause and Court; that I thereafter caused my said shorthand notes to be reduced to typewriting; and that the foregoing transcript, consisting of pages 1 to 19, both inclusive, constitutes a true, full and accurate transcript of my said shorthand notes, so taken by me as aforesaid, and of the whole thereof.

Dated at Portland, Oregon this 17th day of April, 1944.

IRA G. HOLCOMB
Court Reporter.

[Endorsed]: Filed March 23, 1945. [20]

[Title of District Court and Cause.]

Portland, Oregon, Monday, May 22, 1944
3:40 o'clock P. M.

Before: Honorable Claude McColloch, Judge.

FURTHER PROCEEDINGS OF PRE-TRIAL CONFERENCE

The Court: While you are in the courtroom, Mr. Reilly, Mr. Gentner and Mr. Wagner, in view of the seriousness with which I [21] regard the question I have raised I don't feel like attempting the trial of OPA cases unless juries have been demanded. Mr. Gentner's case is set for trial when I get back from Medford, as I remember it.

Mr. Gentner: June 6th, your Honor.

The Court: I purposely set it for pre-trial ahead of my going away so that you would have as much threshed out as we could. Frankly I have anticipated difficulties with the OPA cases ever since I heard the first one about a year ago now, I guess, and I have approached them cautiously, and I think everyone on the bench has done the same thing. I am going ahead and complete the trial in all issues on the plaintiff's case tomorrow in order to get through, because we can reserve certain questions where a jury is not present, whereas with the presence of a jury they demand immediate decision. So I am going to want the benefit of everybody's research and have an argument about jurisdictional and other questions, but I am not willing to go into the trial of the Kuckenberg cases in view of what

has occurred today, in the presence of a jury. In short, I am not going to be ready to decide some of these things then. I know you will not have completed your case previous to that time.

Mr. Reilly: Probably not, your Honor.

The Court: No. And when you go down to your office I want you to get word to your friend, Mr. McCutchan, who was [22] to try the case at Medford, and give him a summary of what has happened here. For the same reason that case goes off down there next Monday, and ask him to send word to Mr. Newbury, will you please.

Mr. Wagner: Very well, your Honor.

The Court: We will go ahead this afternoon so our time is not wasted; I mean yours rather than mine.

Mr. Wagner: Your Honor will recall that originally there were two proceedings involving Kuckenberg transactions. One was a discovery proceeding and the other was one in connection with furnishing of construction and road maintenance equipment to the Goerig Construction Company in the construction of an airport up near Bremerton, Washington, and then during the discovery proceedings there became disclosed various excessive charges involving furnishing of similar equipment in a similar manner to the Buckler Construction Company, resulting in contended excessive charges in the sum of \$1,182.50. A third and further operation was——

Mr. Gentner: How much did you say, Mr. Wagner?

Mr. Wagner: I have the figure \$1,182.50. Is that correct? That may be subject to——

Mr. Gentner: Is that your present figure? You see, your first case was, I think, around eighteen hundred, wasn't it? It was on Buckler.

Mr. Wagner: Yes. Well, that is the figure I think at this [23] time.

Mr. Gentner: Eleven eighty-two?

Mr. Wagner: Eleven eighty-two fifty. Goerig transaction \$18,882.42; and Lease & Leigland, still a third purchaser, excessive charges amounting to \$615.19.

Now it is the position of the plaintiff in this case, your Honor—and the prices here are covered by Maximum Price Regulation No. 134—it is the position of the plaintiff that, although the defendant filed certain rates with the Washington office of the Office of Price Administration that he asserted to be his rates in effect during the year 1942, he nevertheless had an established rate during the month of March, 1942, that was then in effect; that the rates that the defendant filed were different and other than those which he had in effect; and in support of those rates that we maintain the defendant had in effect we wish to offer a contract between the Kaiser Company, Inc., and Kuckenberg Construction Company, I believe dated during the month of January—dated the ninth day of February, 1942—providing for the furnishing of various types of equipment by Kuckenberg Construction Company to the Kaiser Company on a fully operated basis and at named rates. The contract

has supplements to it, one dated March 18th, another one September 2nd, change order dated July 3rd, 1942, all of which we are offering as the first exhibit. [24]

Mr. Gentner: These change orders were not different from the original, were they, Mr. Wagner?

Mr. Wagner: I believe not.

Mr. Gentner: They just add further equipment at the same rates?

Mr. Wagner: That is right; further equipment.

Mr. Gentner: At the same rates?

Mr. Wagner: Yes. I was particularly interested in the things that were covered by the contract in effect during March of '38.

Mr. Gentner: I mean, was there a different rate fixed on these change orders than in the original?

Mr. Wagner: No, I don't think so. I think it covers substitution of various equipment possibly where repairs were necessary and the addition of certain equipment.

Mr. Gentner: A different type of equipment?

Mr. Wagner: No, I don't believe so. That is not my recollection.

Mr. Gentner: We won't ask you to prove this. May I just look at this a little bit while you go ahead. We won't ask you to prove this. We entered into this contract all right.

(The contract between Kaiser Company, Inc., "Contractor," and Kuckenberg Construction Co., "Subcontractor," etc., so offered, was marked Plaintiff's Pre-Trial Exhibit 1.) [25]

Mr. Wagner: May I have this marked 2. You want to take a look at this Plaintiff's Pre-Trial 2? It is a certified copy of payment voucher dated April 18, 1942, payable to Kuckenberg Construction Company, the amount indicated being \$16,098.02, being payments of Progress estimate No. 2 on sub-contract No. 3 for period March 1st, '42, to March 31, '42, the certification being made by Asa N. Ward, Resident Auditor of the Maritime Commission. Attached to this payment voucher are progress estimates indicated in the payment voucher.

Mr. Gentner: We will admit that this voucher—I guess that is all right, isn't it? Of course, Mr. Wagner, we don't admit the relevancy of either the contract or of the payment voucher, or anything in connection with the Kaiser contract. I want that understood.

Mr. Wagner: Well, this offer is our offer in the establishment of base period rates.

The Court: It will be marked for identification.

(The certified copy of payment voucher dated April 18, 1942, payable to Kuckenberg Construction Company, with papers attached, so offered, was marked Plaintiff's Pre-Trial Exhibit 2.)

Mr. Wagner: Now do you have available your application or your submission of rates to the Washington office?

Mr. Gentner: Yes, sir.

Mr. Wagner: The letter from the Washington office? [26]

Mr. Gentner: Yes.

Mr. Wagner: We would also like to introduce those.

Mr. Gentner: There they are.

Mr. Wagner: Have this marked Plaintiff's 3. It is letter of January 5th, '43, from Kuckenberg Construction Company to the Washington office of Price Administration.

(The copy of letter dated January 5, 1943, Kuckenberg Construction Company to Construction and Road Maintenance Equipment Board, Office of Price Administration, Washington, D. C., so offered, was marked Plaintiff's Pre-Trial Exhibit 3.)

Mr. Wagner: Plaintiff's 4 is the reply of the Washington office of Price Administration to the Kuckenberg Construction Company in connection with the rates.

(The letter so offered, dated February 5, 1943, Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, Office of Price Administration, was marked Plaintiff's Pre-Trial Exhibit 4.)

Mr. Wagner: In this case, your Honor, we have, I believe, agreed to stipulate at this time that certain transcriptions also in this case were taken from the records of the Goerig Construction Company involving rates that were charged. There is some question as to the extent and the amount of payment by the Goerig company [27] to the Kuckenberg Construction Company.

Mr. Gentner: I think we can agree on that, Mr. Wagner.

Mr. Wagner: I don't recall the amount. That is why——

Mr. Gentner: I have the amount. \$94,501.80 is what we received.

Mr. Wagner: We will offer as our next offer this transcription of rates. Do you want to look at it?

Mr. Gentner: That is the same as you gave me?

Mr. Wagner: Yes.

Mr. Gentner: We agree that that specifies the hours correctly and the type of equipment used, if that is the one that we got.

(The statement so offered, consisting of three sheets, the first of which being headed, "Kuckenberg Rentals to A. J. Goerig Const. Co. March 10, 1944," was marked Plaintiff's Pre-Trial Exhibit 5.)

Mr. Wagner: The next offer is the same concerning rates charged by Kuckenberg to George H. Buckler Corporation, I believe, or is that just George H. Buckler?

Mr. Gentner: There are a series of companies. There are four or five I think various companies.

(The statement so offered, consisting of two sheets, the first headed, "Kuckenberg Rentals to Buckler Company, etc. Andrew Lee Rapp 3-16-44," was [28] marked Plaintiff's Pre-Trial Exhibit 6.)

The Court: Let me be clear. Is there just one

case now in which all the claims have been consolidated?

Mr. Wagner: That is right, your Honor. They have all been consolidated. In one case the original application for an order for the production of the records has been dismissed.

The Court: Well then, after that there was reference, when you were getting ready for trial at one time, to another claim that was going to be made and the complaint as to that had not been filed yet you said.

Mr. Wagner: That is right. I included it in the amended complaint in the present proceeding. There are all in all three different companies or purchasers concerned here.

No. 7 is a transcription of transactions between Kuckenberg Construction Company and Lease & Leigland.

(The statement so offered, consisting of two sheets, the first headed, "Kuckenberg Rentals to Lease & Leighland. Andrew Lee Rapp, March 20, 1944," was thereupon marked Plaintiff's Pre-Trial Exhibit 7.)

Mr. Wagner: Your Honor, my recollection is that on previous occasions we furnished your file with copies of the applicable regulations in this matter. I am not quite sure about that. The provisions of the regulations upon which the plaintiff is relying are Maximum Price Regulation No. 134.

[29]

The Court: Now you can ask me about the

regulations and I can answer you as to what you gave me.

Mr. Wagner: Amendment No. 3.

The Court: I have it.

Mr. Wagner: Section 1399.6 on page 3.

The Court: I have ahead of that 1399.1.

Mr. Wagner: That is right.

The Court: Then I have 1399.6 (a).

Mr. Wagner: That is right.

The Court: What else?

Mr. Wagner: Possibly 1399.7, on page 4. Point 1 and point 6 are the two that we principally rely upon. And I believe, your Honor, that is the plaintiff's evidence and plaintiff's case, with the exception of the two matters which Mr. Gentner has indicated, one being a matter of payment in connection with the Goerig Company transactions which I believe he has records pertaining to, and the other issue being in connection with the extent of extraordinary wear and tear which the defense has not pleaded but which we believe will be a matter at issue here. We have indicated previously on pre-trial that we had no objection to their making a showing of unusual circumstances that would warrant an allowance to them, but we have no such evidence within our own files or at our command. It is entirely within——

The Court: I am not clear what issue that would make for a [30] jury. You had better explain your side of that to me first, this wear and tear question. You have been suing here for treble damages, as I understand, for charges above

your standard stock charges at the control date. Now at this later stage of the case you say that because of unusual wear and tear by the lessee——

Mr. Gentner: By the lessee. Yes, your Honor.

The Court: ——by the lessee that you are entitled to charge more than OPA says was the base rate. Now just what kind of an issue would that make? Would that make a flexible rate for the jury, and if they found that they could lower the amount of the Government's claim, or would that throw the Government's claim out altogether?

Mr. Wagner: It would be in mitigation of the Government's claim, your Honor. It would be——

The Court: In other words—may I interrupt again—that would be an alternative position, a position taken in the alternative by the defendants, that the base rate was not as claimed by you, Mr. Wagner, but was higher when wear and tear was taken into account?

Mr. Wagner: No. We do not believe that it will have any bearing on the base rate but it has been asserted in our previous pre-trial hearing that there were extraordinary and unusual circumstances that caused the breakage and very unusual wear and tear in connection with the operation of this equipment, [31] and just exactly what position the defendant wishes to take along those lines I don't know but it is one of the matters that is at issue and may result in a difference, in at least an offset in connection with the amount claimed due by the Government by virtue of the rates.

The Court: Do you want to discuss that first?

Would it be handy to discuss that first, Mr. Gentner?

Mr. Gentner: Yes, your Honor. Mr. Wagner, you were not insisting upon the pleadings setting forth the position that we are entitled to deduct the amount of unusual wear and tear that was added on, are you? You are satisfied that that issue can be determined under the pleadings as they are, I assume?

Mr. Wagner: Well, I have no objection to your making a showing, and if it is necessary——

The Court: It will be included in the pre-trial order.

Mr. Wagner: Yes.

The Court: As one of the defendants' contentions, you see.

Mr. Gentner: Yes.

The Court: Then it would be a good idea in this case, since you speak about the pleadings, to put it in. The pleading should be amended in accordance with the foregoing.

Mr. Wagner: Yes. That is right, I think, your Honor.

The Court: A catchall.

Mr. Gentner: Very well, your Honor. It is the contention [32] of the defendants that when this equipment was originally rented to Goerig, A. J. Goerig, an individual up here at Bremerton, the conditions of the job and of the soil and surrounding the rental were misrepresented to Kuckenberg Construction Company, and that if the conditions had been properly represented and the true condi-

tions had been divulged at the time this equipment was undertaken to be rented, that the equipment never would have been rented at all, as the job was not a proper one for this type of equipment.

In connection with that, what we would show is that this job was one where the use of a shovel and trucks was proper but not the use of tractors and scrapers or graders, as were rented, and the work had to be carried out by excavating circular revetments in the side of hills and that necessitated the use of these scrapers on a circular basis for which they are not constructed. They are constructed for a straight pull ahead, and the use of these graders and equipment on a circular basis just tended to ruin them. The big tires that are on these scrapers or carryalls received side thrusts of rocks and destroyed them, and also the entire equipment was just racked to pieces by the method of use.

(At this point the gentleman sitting next to Mr. Gentner spoke to him in an undertone.)

Mr. Gentner: In the loading of them, yes. And as soon as this condition was discovered the Kuckenberg Company shut the [33] job down and refused to proceed, whereupon Mr. Goerig came to Portland and had a consultation with the Kuckenberg people here and pleaded with them to leave the equipment on the job and they would pay them for the excessive and unusual wear and tear that would result from permitting the equipment to be left there.

Our evidence will further show that at that time the price regulation was very new and what people were to do was very uncertain and that Mr. Kuckenberg consulted the local office of the OPA here as to what his procedure should be and was advised that it would be a matter of agreement with the lessee and that an agreement should be entered into with the lessee, and we will show that the Washington office of the OPA had placed in the hands of the local office here a series of fifty questions and answers for the guidance of persons inquiring, and in these questions and answers it was indicated that the matter of unusual wear and tear was a matter of agreement between the parties. Consequently an agreement was reached whereby the sum of \$2.00 per hour—I might say, first, the Kuckenberg Construction Company agreed to let Goerig just pay for whatever the actual extra wear and tear would be but he rather desired to have it on a basis of a certain amount per hour, and a new contract was entered into then setting forth an additional price of \$2.00 per hour for this unusual wear and tear.

Now our position is that we are entitled to this additional \$2.00 and we are prepared to show our actual expenditures in connection with unusual wear and tear, if that is the [34] basis upon which the OPA wants to have us proceed.

Now it is understood, is it, Mr. Wagner, that your position is that whatever actual expenditures we may show by way of unusual wear and tear in connection with this contract would be properly

deductible from the amount that we charged under this \$2.00 per hour? Is that your position?

Mr. Wagner: Well, I think that, of course, any showing that you might want to make would be in mitigation of the Government's claim for damages.

The Court: What is your claim in dollars?

Mr. Wagner: Sixty——

The Court: Just give me round figures.

Mr. Wagner: About three time \$20,000.00. About sixty-two thousand.

The Court: You claim they overcharged twenty thousand on the base rate. Deducted from the twenty thousand is this extra charge of \$2.00 per hour?

Mr. Gentner: That results in 13,800 odd hours.

Mr. Wagner: Just a minute. That is not exactly our position. They indicated that \$2.00 an hour was the amount that was agreed upon as covering extraordinary wear and tear. We do not concede that that is an appropriate charge or that that rate was ever approved. We are willing to concede that if there was breakage or if there was accidental mishaps that caused extraordinary expenditures on the equipment, or if there was such circumstance prevalent there that extraordinarily short hours were sufficient to wear out a piece of machinery, that that can be shown, and if shown to be relevant, of course, to the job, why it could be used to offset.

The Court: When did you first hear of this, Mr. Wagner?

Mr. Wagner: When did I first hear of what?

The Court: This charge for extraordinary wear and tear. Was it in the file brought to your attention before you brought the suit, or have you heard it only since you have gotten in these hearings?

Mr. Wagner: It was called to my attention—my recollection is it was called to my attention prior to the institution of the proceedings, at least the latter one. I am not sure exactly when it did come into the picture.

The Court: If you had the figure available to you shouldn't you have reduced your claim by that amount at that time?

Mr. Wagner: Yes, but we had no figures available. And then, your Honor, there is a question of fact as to what the extent of this extraordinary wear and tear is.

The Court: Yes. But I said if you had a figure available to you—if you had a figure that you could have relied on—I take it you would have reduced your claim by that amount at that time.

Mr. Wagner: Yes, your Honor.

The Court: All right. Now you say at the \$2.00 an hour it [36] figures up thirteen thousand dollars?

Mr. Gentner: Thirteen thousand eight hundred I believe is what the charge was.

The Court: At \$2.00 an hour?

Mr. Gentner: \$2.00 an hour; yes, sir.

The Court: And you have your data here to show what the cost of repair or replacement was on account of extra wear and tear?

Mr. Gentner: Your Honor, in order to prove that I have here all of our entire expenditures on this job. The only way I can prove it is to bring our records up here showing what we paid out, both at Bremerton and Portland.

The Court: Settlement has been made between the parties?

Mr. Gentner: Well, we billed them for a hundred thousand dollars and a few thousand over, and he paid \$94,501.80 and then refused to pay the remaining five thousand odd dollars, which he still refuses to pay; so that we have received \$94,501.80, though we billed them for one hundred thousand.

The Court: Yes.

Mr. Gentner: One of the questions I think possibly that might arise here is which figure is to be taken, whether the amount we actually received or the amount that we billed.

The Court: The Government's position has been, I believe, it is the amount that you charged them.

Mr. Gentner: Yes, that has been their position. And one [37] reason for asking for these documents in the subpoena was that the Government had taken the position in the Oregon Transfer case that it was the amount that was paid, not the amount that was billed. In the Oregon Transfer case they had billed for, oh, more than \$20,000.00 in excess of the rate that was allowed and settlement was permitted to be made on that basis, whereas here we are being held by the amount of the charge and not by the amount that we actually received.

But, going further, I might ask, it would be conceded, would it not, Mr. Wagner, in this case there was no specific direction from the Administrator directing the institution of the action for treble damages in this case?

Mr. Wagner: Well, I think that you are going now to the question that the Court raised.

Mr. Gentner: Yes.

Mr. Wagner: I think that those matters can be disposed of in the matter that is already before the Court, and of course I will interpose the same objection, that it is impertinent and it is irrelevant here, and, therefore, I ask the Court to rule similarly as was ruled in the other case this morning.

Mr. Gentner: What I was getting at was the question of fact as to whether or not any specific order or direction had been given by the Administrator as to this particular case?

Mr. Wagner: On the bringing of the action?

Mr. Gentner: Specifically? [38]

Mr. Wagner: The same objection.

Mr. Gentner: No. As a matter of fact, did the Administrator specifically authorize the bringing of this case?

Mr. Wagner: Well, that depends upon what you might feel was the authority of the Administrator. I mentioned in the previous case, Mr. Gentner—

Mr. Gentner: I don't mean by delegation, but I meant by direct order by the Administrator to file suit against the Kuckenberg Construction Company for treble damages. Is there such authority?

Mr. Wagner: I will go through the file and see if there is such authority.

Mr. Gentner: You would know, wouldn't you?

Mr. Wagner: I will go through the files and see if there is such direction and let you know.

Mr. Gentner: You don't know?

Mr. Wagner: I don't know offhand, no. It is very difficult to remember a great many things, Mr. Gentner. I just don't know but I will ascertain it.

The Court: You were able to make a positive statement in the other case.

Mr. Wagner: Yes, that is right.

Mr. Gentner: I was wondering why you can't make such a statement here.

The Court: You don't recall? [39]

Mr. Wagner: No, I don't. There has been a great deal of correspondence back and forth in connection with these cases.

Mr. Gentner: Now similarly I would like to know whether there was any direct order by your District Administrator directing the filing of this case.

Mr. Wagner: I don't recall. I recall none. The same objection, however.

Mr. Gentner: Well, continuing, your Honor. I have here——

The Court: Well, here, you don't want to make an admission broader than the fact, or than you need to. I am pretty sure I am going to disagree with you—if you hold the view that the legal staff can begin one of these cases without direction from anybody, I am pretty sure I am going to disagree with you on that. Now then, I don't want you to

make an admission, the full import of which you don't realize, without explanation of what you have just said, which might be taken to mean that this case was brought by the legal staff, if not by direction from the Administrator, which you are going to look up, if not by direction from him without direction by—what is the title of the man here in Oregon?

Mr. Wagner: Director.

The Court: The director for Oregon?

Mr. Wagner: District Director for the District of Oregon.

The Court: District Director—just put it in the record here, just his full exact title. [40]

Mr. Wagner: District Director for the District of Oregon.

The Court: Of OPA.

Mr. Wagner: Office of Price Administration.

Mr. Gentner: It was Mr. Montgomery at that time.

The Court: District Director of the Office of Price Administration for the District of Oregon.

Mr. Wagner: That is right.

The Court: I don't think you intended to say that Mr. Montgomery did not know of the bringing of these cases and authorized them to be brought—this particular case, the Kuckenberg case? We just have the one case now.

Mr. Wagner: No, I don't believe I said that. I said I did not recall or remember what exactly was in the file in connection with the bringing of the action.

The Court: Yes.

Mr. Wagner: But I will ascertain that, or will do so now.

The Court: Yes.

Mr. Wagner: If the Court would desire it. It may take quite some time.

The Court: No. You take your time about it because you will have two questions there I would like to have you answer on the record: One, what direction, if any, was given by the Administrator to bring these cases, now one case? Two, what direction, if any, was given by the District Director for bringing these cases, now one case? And you take your time in checking your files and your [41] other available information before you answer on the record either of those questions. Your daily contact here with the District Director may provide you the answer as to him. I don't know that I would hold, like you do in some Government cases, that everything had to be in writing, if you were able to tell us that Mr. Montgomery, who was then District Director, knew of these cases and approved of their being brought. You see, a funny thing happened here due to a change in our procedure. I don't just remember how Government pleadings were signed or verified, or whether they were not. From where I sit you get out of the habit of looking closely at things like that. But if prior to the adoption of our New Rules of Civil Procedure—they are no longer new—pleadings were signed and verified, or either one, when they were brought in behalf of

the Government, you would have somebody's name on these complaints.

Mr. Wagner: That is true.

The Court: Nowadays you would have Mr. Bowles' name on there, you would have Mr. Montgomery's name on there, or Mr. Brown's now, but our rules permit an action to be started by the filing of a complaint signed only by the attorneys, who warrant themselves by signing the paper to be duly authorized to proceed.

Now then, that means, without any embarrassment being [42] intended at all, when a question like this comes up they have to tell us who it was told them to file these cases, and the papers don't bear a verification any more. If you just think about it a minute that change in the rules is because of the high respect which is accorded to the bar, that when they put their names on a paper they are acting with authority.

Now we know if the Administrator, who is resident away from here, gave you any authority in the case it would be in writing and that would be found in the file, but you might be able to say, you might want to say as to the District Director that that was a matter of oral discussion and knowledge. Just take your time about that, Mr. Wagner—both of those things.

Mr. Wagner: Yes. I just recall that not so long ago a similar question came up in the state court, in which I was counsel, and had as counsel verified the pleadings. It so happened that in the verification no statement was included to the effect that the

plaintiff was not residing—not within the State of Oregon. But in that situation, as a matter of fact, the facts concerning the litigation were peculiarly within my own knowledge. That would be an analagous situation here, I think, where the Administrator is not a resident of the State of Oregon but the facts being particularly within the knowledge of the counsel representing the Administrator I think if a similar pro- [43] vision had been made for the verification of these pleadings, that it would be very close and very analagous to that situation.

The Court: Well, except one thing. I want you to take away from here one thing—and you will be helped by looking over the question of law very exhaustively and studying your authority to represent the Government—suing for the United Staes, whether directly or indirectly, is a different proposition than suing for claimants who are private individuals, I think. Now go ahead, Mr. Gentner.

Mr. Gentner: It is understood then, Mr. Wagner, that whatever amount our proof would show was due to unusual wear and tear you are prepared to concede would be a proper deduction from the amount you are claiming here on account of this \$2.00 an hour extra? Do I get this clear, or are we in accord on that?

Mr. Wagner: It would seem to me, Mr. Gentner, that the appropriate thing to do would be to make an offer of proof of the extraordinary expenditures and prove that they were extraordinary expenditures.

Mr. Gentner: Well, yes, but granting that, I mean as legal proposition.

Mr. Wagner: And then the matter can be determined upon the submission of the proof.

Mr. Gentner: I mean, but assuming that we do prove that, if [44] we do prove that, as a legal proposition you are prepared to say that that would be a proper deduction?

Mr. Wagner: Yes.

Mr. Gentner: All right. That is fine. Your Honor, the only way we have, as I say, of establishing that is by putting in our total payrolls. You see they are all in one—our total payrolls for labor, both at Bremerton and at Portland, and our total expenditures for repair parts. Our records were not segregated, not anticipating any necessity of segregating unusual wear and tear. Our records are all combined, showing all of our expenditures on this job, which total \$90,853.23, and from that we are segregating the labor and parts that were expended for these unusual repairs, amounting to some \$33,552.00. I might say we actually spent within a little over \$3,000.00 of the amount we took in on this job.

Now I have here all of our payrolls.

The Court: Well, you won't want to leave them here.

Mr. Gentner: No.

The Court: We won't get to try this case for quite a while.

Mr. Gentner: I have a summary here.

The Court: That is a good idea. Leave that with Mr. Wagner for his information.

Mr. Gentner: I will give you a copy of the original summary here.

The Court: Just put it in for the time being as a provisional [45] exhibit here, to be supplemented later by the originals if and when we go to trial.

Mr. Gentner: Here is the original of the Portland payrolls.

Mr. Wagner: For the purpose of the record, why the Administrator is objecting at this time to the summary upon the ground and for the reason that there is nothing in here to show that these are expenditures for overtime.

The Court: I will save you a little time. You won't need to state any objections now. All that is being done now is to state your position and to identify documents, and the right to make objections is reserved to both sides until the time of the trial.

Mr. Wagner: That is fine then. That is what I want to do.

The Court: This is just for enlightenment. Mr. Gentner is figuring on working you out of Court, you see, by establishing there were no overcharges in this case.

Mr. Wagner: Yes.

Mr. Gentner: Then I have a summary of all of our invoices that are shown here. I have invoices covering all expenditures on the job of hauling. These are the summaries we have, which we would have to support by the production of these invoices.

I might say, your Honor, that apparently there is one defense we have here. It is the question of immunity. It has been raised here as an affirmative defense, and I have here and [46] present the written statements covering those obligations. I think you have the originals of those, don't you, Mr. Wagner? They were submitted to you.

Mr. Wagner: Yes. I think the record can show that the claim of the constitutional privilege against self incrimination has been consistently made by the defendant in connection with all the matters, with the exception of the Goerig Construction transaction and the records involved there. No claim was made on the grounds at any time, on those grounds in connection with that matter of those transactions.

Mr. Gentner: You mean you didn't take any documents? Is that what you mean?

Mr. Wagner: That is right.

Mr. Gentner: Now, if the Court please, I would like to make a statement. The question of Kuckenberg Construction Company not socalled cooperating with the OPA has been raised repeatedly here and apparently is the basis, as near as I can gather, for the prosecution here and the sentiment otherwise.

Mr. Wagner: I want to take exception to that statement, your Honor. I don't think any statement was ever made——

The Court: I made it, didn't I?

Mr. Gentner: I think the Court made it.

The Court: Didn't I? That is the impression I got.

Mr. Gentner: I got the same impression, your Honor. [47]

Mr. Wagner: But the Court stated it was an impression.

The Court: Thank you.

Mr. Gentner: I got the same idea, and I feel in all fairness I should at least make a statement as to why our position is taken. We stood on our rights there and undoubtedly it was a mistaken idea that I had at the time but when the attempt was made to get the remaining money from Mr. Goerig I was met with a refusal by his attorney, Mr. Middleton, who informed me that he was associated with Mr. MacCormac Snow, former Chief Enforcement Attorney for the OPA, who was now representing Mr. Goerig, and that Mr. Snow was now representing Mr. Goerig, and based on that they were refusing to pay the balance of this money, something over \$5,000.00 and that was followed very shortly by these proceedings in the OPA, and while I say I didn't know Mr. Wagner during the time, during the procedure of this litigation I came to know him quite well and I think if I had known him then I would have felt a little differently but at the time from the fact that Mr. Wagner had been a former office associate of Mr. Snow it occurred to me at the time and I felt it would be unwise——

Mr. Wagner: Let me correct you there, too. I never have been an office associate of Mr. Snow until, may I say, Mr. Snow's resignation from the OPA, at which time he occupied the office that I

formerly occupied. Other than that, there has been no association. [48]

Mr. Gentner: I had a deal to close over at Mr. Snow's office and I saw your name on the door.

Mr. Wagner: That is true. I still have mail coming over there.

Mr. Gentner: So I didn't feel inclined to—it just seemed to dovetail with me at that time. But, as I say, during the time since then I have spoken to Mr. Wagner and he has been very fine in all respects and very agreeable and I probably would have felt a little differently if I had known him a little better at that time. I think that explains why we refused to turn over records at that time. It was for no other reasons. It seemed to just dovetail in. And Mr. Wagner stated this morning—of course it wasn't our case but I was here and heard it—that we had refused to settle. On the contrary, I think our evidence will show that very recently here Mr. Kuckenberg offered if any basis could be arrived at to pay back any amount that the OPA would say was improperly charged and that was refused, and then an offer was made to pay to the OPA such amount and that offer was refused, and I asked upon what basis the matter could be settled and Mr. Wagner was——

Mr. Wagner: Well, just a minute, Mr. Gentner. I don't appreciate this going into a long discourse for the Court over proposals and counter-proposals for settling the Administrator's claim. I don't think it is relevant and I don't think it has [49] any place in here either at pre-trial or trial.

The Court: It might have some, because I take the view that wilfulness is an element of the offense. I don't know about that. I have an open mind about that yet.

Mr. Wagner: I appreciate that, your Honor. I would like to have an objection to the statement of counsel made a matter of record.

Mr. Gentner: And while, as I say, Mr. Wagner was friendly and a very fine person, yet he was adamant in insisting that treble damages to the OPA would be the only basis he would consider, if we wanted to pay treble damages to the OPA for the amount they felt was due; otherwise that would be the only basis, and our offer to do as was done in the Oregon Transfer case was refused.

We also left with Mr. Wagner for weeks our summary of records in the Goerig case and they had full facilities for seeing our position in that matter.

So that, as I say, as soon as I got to know Mr. Wagner a little better I came up and offered to do anything that they wished and return whatever they felt was overcharged, although, as I say, we consistently felt as far as we could find there was no overcharge but, in fact, an undercharge.

Our position then is that there was not any established charge in effect on March 31, 1942, by virtue of the Kaiser con- [50] tract; that that contract apparently is for a fully operated rate, and that there is no provision in the regulation for the establishment of a fully operated rate as of March 31, 1942.

Now I not only believe that to be true from a reading of the regulation itself but I have the authority of the OPA itself in numerous of these laws by letters that they have sent from Washington, whereby they have denied the existence, the possibility of the existence of any such a rate. Now in the letter to Kuckenberg Construction Company, for one, they have done so, and I have here numerous other letters likewise denying the existence of any such a rate as of March 31, 1942, for a fully operated rate.

The position of the OPA at Washington has been that there must have been a rental on the bare basis and the fully operated basis before an established charge in fact would come into effect as to operating and maintenance services. There is only provision in the regulated services for the establishment of "established charge in effect" upon the operating and maintenance services; not under "fully operated"—under Amendment No. 3, which was in existence at the time this rental took place. Since then there has been adopted Amendment 9, which provides for the establishment of "fully operated" rates upon application to Washington, D. C., and which has been done by Kuckenberg Construction Company and a fully operated rate allowed. Prior to that time unless there was a rental on a bare [51] basis and a fully operated basis it was impossible to have an established charge in effect. And, furthermore, this Kaiser contract was entered into in February, 1942, and the regulation defines an established charge in effect as meaning one pro-

vided in published service charge sheets or a charge regularly quoted. The Kaiser contract was entered into in February, 1942, and continued during its life there, during the life of that work. Subsequent to that time there was an increase in the price of wages here in the Portland area on March 25th, so that the price which was quoted in February was not a quoted price on March 31st, and the existence of a contract in February would not establish an established charge in effect on March 31st at a later date, even though the contract continued over that period of time. That is one point here.

We also have the rate that was established by the OPA Washington, D. C., under Section 1399.6, subsection (2) (b), which is the letter that Mr. Wagner offered here of February 5th, 1943, from the Washington office of the OPA, and that was in response to letter of Kuckenberg Construction Company. In that letter the Washington office held that there could be no fully operated rate and fixed a rate at that time for operated and maintenance services.

Now then, I also have here further letter from OPA, Washington, D. C., to another contractor, wherein the OPA at [52] Washington has taken the position that such a rate when allowed is retroactive and covers all contracts entered into subsequent to October 22, 1942, I think when Amendment No. 3 became applicable, and consequently it is our contention that in the absence of any evidence of the establishment of a charge for an operated and maintenance service, that there was no established rate

as of March 31, 1942, and if that was the case then the letter of February 5th, 1943, became applicable to our case.

We will be prepared to show, I believe, that there was a quotation of rates for operating and maintenance services in Spokane and also in Portland as of March 31st, 1942, at a higher rate than was allowed by this letter of February 5th, 1943, and it will be a question of fact whether or not we had an established charge in effect as of March 31st, 1942, at a higher rate in Spokane, and also in Portland, or whether or not the letter of February 5th, 1943, would prevail to establish our rates.

I have here prepared and will submit computations of all of those cases showing the billings by Kuckenberg Construction Company on all of the jobs in question, and then a comparable billing on the rates allowed under this letter of February 5th, 1943, which show that we are under to the extent of \$6,000.00 on the Goerig job as to billings and \$12,000.00 as to money received. I think that even allows the \$2.00 for— [53] no, I guess not. No; that is excluding the \$2.00 for unusual wear and tear, which is a separate factor.

Now then, these computations also show on the Buckler cases that we are under to the extent of \$1800.00, according to the February 5th letter on the Buckler cases, and under on all the others. So that on the basis of the authorization from Washington, D. C., we are under on all the cases which are up before the Court.

We have a further contention here that the--- well, I may say that there may be some confusion, that the machines should be considered separately instead of the aggregate prices. I might illustrate that in this manner:

In the Buckler case we rented six motor graders and three shovels with the capacity of three quarters of a yard. Now they were all rented at the same price when they were rented by Kuckenberg Construction Company; that is, so much per hour for the time used. Now taking these machines by OPA billings based on the February 5th letter, that would leave in the case of the motor graders three of them that would be under the OPA charge to the extent of about \$1100.00 and three would be over about \$1100.00 and if you took the six together you would be even.

Now on the shovels, if you took the OPA billings with the same price and same machines on the same job, two would be [54] under the OPA maximum and one would be over, but if you took all of the equipment together we are \$1800 under the OPA ceiling price fixed by this letter. That is on the basis of the letter of February 5th.

Now we are prepared to show that this regulation, which I stated the other day to your Honor finishes a method or procedure for the establishment of these rates for operating and maintenance service by the office of the OPA in Washington, D. C., by letters, but the regulation furnishes the basis upon which those rates must be fixed, and there is the requirement in there, the positive re-

quirement in these words: "that it must result in a price bearing a normal relation to the maximum price of the competitive supplier of the same or similar service." I have here——

The Court: Put it in the record right there, the regulation number and the page and so on.

Mr. Gentner: That is 1399.6, subsection (2) (b). That is Maximum Price Regulation 134, Amendment No. 3. I have here, which I am offering, the application of two contractors, which include application for a price for motor graders, and these two graders were used on this same job side by side with those of Kuckenberg at the same time, and they were similar, the only difference being that if anything they were smaller than the Kuckenberg motor graders, and the application was made at approximately the same time. The rate allowed to Kuckenberg [55] was \$3.50 per hour and the rate allowed to the other two was \$4.40 per hour for operating and maintenance service.

Now apparently at one time the OPA at Washington, in one of the letters, stated that the reason for a difference in the rate would be the difference in the method of pricing the service, and I have here this one application where the \$4.40 rate was allowed, where the application listed absolutely identical charges to those given by Kuckenberg Construction Company.

I may say, that as a matter of fact, the two contractors compared their applications and sent them in, and they are identical right down to the last penny, and within a period of a few days the Kuck-

enberg rate came out on February 5th, 1943, and the Porter Yett rate came out on February 23rd, '43, and on identical graders except that Kuckenberg's was bigger. Kuckenberg got a \$3.50 rate and Porter Yett got a \$4.40 rate, and the United Contracting Company also got a \$4.40 rate, and these graders were all used on the same job.

The Court: The applications got in the hands of different clerks.

Mr. Gentner: Well, that is quite likely. Quite likely. Yes, I think that is quite likely; although I think one, maybe both of them, I guess, forgot about ours. That, I say, violates the regulation that I have just quoted to your Honor, in that it does not bear a normal relation to the maximum price of [56] this competitive supplier. If we take the \$4.40 rate, then even going machine by machine there is no overcharge. So that that may have a bearing. I believe also the matter of going machine by machine, as I understand the contention of the OPA it is that he rented six machines and they are all rented at the same price, but you take the OPA method of billing under that three of them resulted in overcharge and three in an undercharge, and they ask you to pay treble damages on the three that have an overcharge but don't give you any credit on the three that have an undercharge.

The Court: Like the income tax—from one year to another.

Mr. Gentner: Now that is another reason why I feel that this Oregon Transfer Company matter

would be pertinent, because under a theory of settlement, as was allowed in that case, that would result in a settlement on a basis of aggregates; that is, not machine by machine but the total charge; because if you have here a charge where the total is under you can always spread it around to the applicable machines, but when you come and say, "No, you must pay on those where you are over and don't get credit for those where you are under," even though the net price to the supplier is less than the OPA allows for the whole equipment you have rented in one contract, why that becomes pertinent and material.

There was a statement this morning by Mr. Wagner that [57] there is a right of appeal from these rates that are allowed by Washington, but I want to call the Court's attention to the fact that there is no right of appeal of any kind from these Washington letters, and therefore it would be a matter within the province of this Court to pass upon the matter whether they are discriminatory or whether they comply with the regulation.

I call your attention very particularly to the provision for appeal, and that is Section 203, I guess it is, 923 under the U. S. Code, that provides for an appeal from a regulation or order under Section 2.

Now Section 2 provides as follows:

"As used in the foregoing provisions of this subsection, the term 'regulation or order' means a regulation or order of general applicability and effect."

Consequently one of these Washington orders that affects only a particular machine of a particular contractor is not meant by this reference. This is neither a regulation nor is it an order within the meaning of the Act.

The other provision for appeal is in the case of a price schedule as specified in Section 206, and in Section 206 we find that the price schedule referred to is one that is required to be published, reprinted in the Federal Register within ten days. It is required to be printed in the Federal Register. Now that means such a price schedule as is a part [58] of this regulation and covers what is known as the bare rental of equipment and has no reference to these letters that come out from Washington, D. C., that fix a price on a particular piece of equipment for a particular contract.

Consequently there is in the Act no provision for any appeal or protest to the Administrator at all of these laws by letter which fix the rate, as they do in this case, of machines side by side, at different amounts and the one who gets the higher rate receives a pat on the back as a patriot and the other is brought into Court here for treble damages.

Now there is a proviso in this same section that provides for these letters from Washington, which says that the contractor or the person who makes the report, after he receives a disapproval of his requested rate, may recompute his proposed charge in accordance with the requirements of this paragraph and the suggestions contained in the disap-

proval and report the same pursuant to sub-paragraph 2. And then the following provision also appears: "That final settlement shall be made in accordance with the action of the Office of Price Administration on such report and if required by the Office of Price Administration refunds shall be made."

I looked this over and I found no provision for a time within which such a recomputation was to be made, and accordingly the Kuckenberg Construction Company sent to the Office [59] of Price Administration a letter—I don't know; it is difficult to read and compute prices where they are put out that way; but, nevertheless, application has been made calling attention to the Office of Price Administration of this discrepancy between the price of \$3.50 and \$4.40, and I think that was on May 5th, and no answer has been received as yet from Washington on that.

Now I wish to offer both these. I sent a follow-up letter in on May 19th calling attention to the fact that they had not answered the letter of May 5th, so I don't know what the answer will be. Do you have copies of these, Mr. Wagner? (Indicating) I presume they have been forwarded to you.

Mr. Wagner: I don't recall ever having seen these before, Mr. Gentner.

The Court: I am going to have him mark these things with you some time later, Mr. Person.

Mr. Gentner: Yes. Do you want to finish this now or at another time?

The Court: I know Mr. Wagner won't want to answer now because you have developed some new things. The only question is, when could you finish without your feelings being hurt?

Mr. Gentner: Well, I suppose I want to take another half hour yet.

The Court: All right. We will do it some other time. [60]

Mr. Gentner: I am sorry, your Honor. There is a vast mass of material here.

The Court: That is all right. I don't always have cases that involve as many questions as these.

Mr. Wagner: In connection, your Honor, with the matter that was raised here earlier, I just wanted to call the Court's attention to Section 201 (a) of the Emergency Price Control Act, wherein it provides that attorneys appointed under this section may appear for and represent the Administrator in any case in court. That was what I had reference to when I mentioned about the authority of the attorneys appointed to appear for the Administrator.

The Court: Now, look here, that is all right. When I practiced law certain men hired me on retainer, just like you are hired, of course, per month. That didn't mean I could go down and start a case for them whenever I heard that somebody had done wrong.

Mr. Wagner: Yes. I understand your Honor's point.

The Court: You see what I mean?

Mr. Wagner: Yes, I understand your Honor's point.

The Court: You have a right to be here if your client has told you to come here.

Mr. Wagner: Yes.

The Court: That is what I want to know, if the man in Washington, the Great White Father, said, "Sue Kuckenberg out there." [61]

Mr. Gentner: Your Honor, might we have some time limit within which you might produce any authority from Washington?

Mr. Wagner: Well, I imagine your Honor will determine the matter in connection with Mr. Reilly's case.

The Court: Oh, I don't know, but he and I will be talking about it in the Reilly case which begins tomorrow, you see, and in the next day or two. I don't want to interfere with your trial of the Reilly case because it is putting too much on your mind, but you will be able to take a position on it right soon, won't you?

Mr. Wagner: Very soon.

Mr. Gentner: All right. Thank you.

The Court: Yes.

(Thereupon, at 5:15 o'clock P. M., Court was adjourned and the following documents were offered and marked as pre-trial exhibits without the presence of the Court:)

(Statement headed "Cost Summary—A J Goerig Construction Co., Bremerton Airport," was marked Defendants' Pre-Trial Exhibit 8; Statement headed "Portland Payroll Totals

—December 12, 1942, to June 19, 1943,” was marked Defendants’ Pre-Trial Exhibit 9;

Statement dated April 30, 1943, addressed to A. J. Goerig Construction Company and headed, [62] “Hauling Charges,” was marked Defendants’ Pre-Trial Exhibit 10;

Statement headed “Summary of Invoices” consisting of three typewritten sheets, was marked Defendants’ Pre-Trial Exhibit 11;

Statement dated October 19, 1943, signed Henry A. Kuckenberg and addressed to Prentiss M. Brown, Price Administrator, etc., was marked Defendants’ Pre-Trial Exhibit 12;

Statement dated January 6, 1944, signed Harriet A. Kuckenberg and addressed to Chester Bowles, Administrator of the Office of Price Administration, etc., was marked Defendants’ Pre-Trial Exhibit 13;

Statement dated January 6, 1944, signed Henry A. Kuckenberg and addressed to Chester Bowles, Administrator of the Office of Price Administration, etc., was marked Defendants’ Pre-Trial Exhibit 14.)

(Thereupon, the proceedings had in the above entitled cause on May 22nd, 1944, were concluded.)

[63]

[Title of District Court and Cause.]

Portland, Oregon, Monday, June 12, 1944.
10:30 o'clock A. M.

Before: Honorable Claude McColloch, Judge.

FURTHER PROCEEDINGS OF PRE-TRIAL CONFERENCE

The Court: I am sorry to have been delayed, Mr. Wagner. This is further pre-trial in the Kuckenberg case. [64]

Mr. Gentner: Yes, your Honor. We were right in the middle of it.

The Court: Oh, yes. You were making a statement.

Mr. Gentner: At the time of adjournment.

The Court: Yes. Would you like to go ahead and complete that statement?

Mr. Gentner: Yes, your Honor, I would. I think I will start in and offer some more exhibits and that I can catch up our position. I think I had presented Pre-Trial Exhibits 15 and 16. I think I gave you copies of those, Mr. Wagner, did I not?

Mr. Wagner: I saw these.

Mr. Gentner: We offer those in evidence.

Mr. Wagner: I am going to object to them. Are there any replies to this correspondence?

Mr. Gentner: Yes. I have a letter here which has not been marked. There are two more in this correspondence and I had better have it marked. Here are two more exhibits.

(The correspondence so offered were marked as follows:

Carbon copy of letter dated May 5, 1944, Kuckenberg Construction Co., to Walter Shoemaker, Office of Price Administration, Washington, D. C., was marked Defendants' Pre-Trial Exhibit 15;

Carbon copy of letter dated May 19, 1944, Kuckenberg [65] Construction Co., to Walter Shoemaker, Office of Price Administration, Washington, D. C., was marked Defendants' Pre-Trial Exhibit 16;

Letter dated May 24, 1944, Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, to Kuckenberg Construction Company, was marked Defendants' Pre-Trial Exhibit 17; and Carbon copy of letter dated June 1, 1944, Kuckenberg Construction Co., to Walter Shoemaker, Head Construction and Extraction Equipment Section, Machinery Branch, Office of Price Administration, Washington, D. C., was marked Defendants' Pre-Trial Exhibit 18.)

Mr. Gentner: Here is the answer from your office in Washington, Mr. Wagner. I have a further series of letters here bearing upon the same point. That is the correspondence between Porter Yett and the United Contracting Company, with relations to these motor graders, consisting of a letter from Porter Yett to the Office of Price Administration at Washington, D. C., dated February 10, 1943; the answer of the Office of Price Administration to Porter Yett, dated February 23rd; a letter from the

Office of Price Administration to the United Contracting Company dated February 27, 1943; and an answer of United Contracting Company to the [66] Office of Price Administration of Washington, D. C., dated March 9th, 1943; and the reply of the office of Price Administration to the United Contracting Company dated March 31, 1943. These are all photostatic copies of the originals and bear upon the same question.

Mr. Wagner: These all being offered as part of the same thing?

Mr. Gentner: Yes. These all bear on the same question. I had better have these marked for identification, I presume.

Mr. Wagner: What, may I ask, is the purport of all these offers?

Mr. Gentner: This, your Honor, is in line with the proposition that I was discussing at the time that the pre-trial adjourned, and that is the question of price granted to Kuckenberg Construction Company by the Office of Price Administration under the provisions of Section 1399.6 subsection (2) (b) (1). The Office of Price Administration at Washington, D. C., is given the authority to set the price of what is known as operating and maintenance services, being about one-half, you might say, of the rental charge of a piece of equipment. Under this regulation what is known as the bare rental is fixed by the regulation itself, and that appears in the regulation, but the price for what is known as operating and maintenance services, consisting of the services of an operator and the fuel, lubrication,

greas- [67] service, and repairs for the maintenance of the equipment which is necessary in connection with what is known as the fully operated rental, that is fixed by the Office of Price Administration at Washington, D. C., under the terms of the regulation, and I was just in the process of pointing out that the regulation provides that the maximum charge for such a service shall be a charge which is determined upon the basis of labor rates in effect on March 31, material prices in effect on that date, and resulting in a price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service.

Now our point was that the price allowed to Kueckenberg Construction Company in the letter from the Office of Price Administration at Washington, D. C., on February 5th, 1943, did not follow the terms of the regulation in that this office at Washington, D. C., at approximately the same time, had fixed a price of \$4.40 per hour for motor graders operating side by side with the motor graders of Kuckenberg Construction Company on the same identical job, for motor graders which were smaller and less costly to operate and maintain than the motor graders of Kuckenberg Construction Company, which was allowed a price of ninety cents per hours less upon the same identical filing of cost data, and that, our contention is, constitutes a violation of the regulation and arbitrary discrimination and violation of both the Act and the regulation, and that the [68] fixing of this price in that

manner did not conform to the regulation itself but constituted discrimination and arbitrary taking of property without due process, which is a point that I think can be raised in connection with this particular phase of the proceeding.

It is true, of course, that the Act itself is not subject to attack in this Court, but we are not attacking the Act. In fact, we are conforming to the Act and the regulation and the point we are raising is that the action of the Office of Price Administration is not in accord with its own regulation.

Now these letters are the applications of these two operators of motor graders that were operating on the same identical job, side by side, with similar equipment, as I say, somewhat smaller, and, therefore, as I say, less costly to operate and maintain, and the answers of the Office of Price Administration fixing these higher rates during the same months and the same year that the price was fixed for Kuckenberg Construction Company.

There are also copies of letters to the Office of Price Administration calling their attention to this fact here in May of this year, and a reply from the Office of Price Administration at Washington, D. C., admitting the fixing of the higher rate, and at this late date, now some sixteen months [69] later, the Office of Price Administration now states that the price which it fixed in February, 1943, for these other motor graders was too high and it now states that at this date it is cutting down the price fixed for the other motor graders and also raising our price from five to twenty-five cents per hour for

some classes of graders, to \$3.75 per hour from \$3.50, and others to \$3.55 from \$3.50. And there is also offered here our last reply to this letter, in which we ask why this discrimination and ask that the price be fixed in conformity with the price fixed for those of a competitive supplier of the same service, and we feel that is pertinent and relevant in this case. That is the purpose of offering these exhibits.

Mr. Wagner: If the Court please, the case is based upon certain rates, base rates that were established rates of the Kuckenberg Construction Company during the period of March of 1942. The regulation providing for base period and rates that were established as being the ceiling rates for the Kuckenberg Construction Company also provided for a remedy of making application where no such rates were established or where there was hardship by virtue of the fact that the rates were too low by application to the OPA in Washington.

Mr. Gentner: Where is that hardship section? I don't find that, Mr. Wagner. Which do you refer to?

Mr. Wagner: Well, it is that section that provides for [70] the application of Procedural Regulation No. 1.

Mr. Gentner: Which one are you referring to by number? I don't follow you.

Mr. Wagner: I don't find it right offhand for you, Mr. Gentner.

Mr. Gentner: I don't believe it is there. I haven't been able to find it, I might say.

Mr. Wagner: But there is a provision in the regulation that provides for an application under Procedural Regulation No. 1, as well as for an application under the various provisions that are set forth in 1399.6 under (2) and (3). Now this correspondence deals with rates of other contractors, correspondence that is dated as late as May 24th, 1944, some of it I believe later, and it has no bearing, no application, no relevancy to the situation that existed at the time when the rates of Kuckenberg Company were first established and when they become effective. And the correspondence and the copies are, therefore, objected to on that ground.

Further, there is no discrimination pleaded here affirmatively, and to let this correspondence go in at this time certainly would be doing nothing more than letting into this particular record anything that may pertain to the establishment of rates, and anywhere, at any time, without regard to the provisions of the applicable regulation or the Price Control Act. [71]

Mr. Gentner: I would ask that our answer be amended to conform to the position we have stated here, if there is any question about the pleadings not covering that point.

The Court: They may be marked and I will rule on their admissibility at the trial.

Mr. Gentner: Mr. Wagner, will you require us to bring witnesses in to identify copies, or are you willing, so far as the identification is concerned, to waive that, reserving merely your objections to the

relevancy of them? It will just mean bringing in these local people to identify their documents.

Mr. Wagner: I am going to object to them and I am going to ask you to bring them in.

Mr. Gentner: You want these men brought in?

Mr. Wagner: Most assuredly, because permitting that sort of correspondence to go in, I don't know anything about the United Contracting Company, Porter Yett, nor any of the other contractors, and obviously there are thousands of them, and permitting this type of correspondence to be injected into this case would be doing nothing more than asking for leave to almost introduce anything in the case pertaining to the contracting business.

Mr. Gentner: Well, I wasn't asking you to admit the relevancy of them; just merely the identification of the documents.

Mr. Wagner: No. I would like to have you put the testimony [72] on at the proper time and introduce them.

Mr. Gentner: Well, if they can be marked as offered, in any event.

The Court: Wherever possible mark them in groups. Can those be grouped?

Mr. Gentner: Yes, they can, your Honor. Those can be grouped.

(The photostatic copies of the five letters constituting correspondence with the Office of Price Administration, so offered, consisting of six photostatic sheets and five letters, were marked Defendants' Pre-Trial Exhibit 19 with subnumbers 19-a to 19-e, both inclusive.)

Mr. Wagner: Have you already made offers of these?

Mr. Gentner: I thought I had. If not, I will offer them. All of these are identified, 15, 16, 17 and 18.

In support of our position that we are taking here to the effect that there is no provision in the regulation for the establishment of a fully operated rate as of March 31, 1942, I have here copy of a letter from the Mid-Columbia Sand & Gravel company to the Office of Price Administration at Washington, D. C., dated May 11th, 1943; answer of the Office of Price Administration at Washington, D. C., to the Mid-Columbia—Mid-City—I guess it is Mid-Columbia Sand & Gravel company, dated May 27, 1943; carbon copy of letter from Ralph R Gay to the Office of Price [73] Administration, Washington, D. C., dated April 16, 1943; answer of the Office of Price Administration at Washington, D. C., to Ralph R. Gay, dated May 7th, 1943; photostatic copy of letter from the Office of Price Administration at Washington, D. C., to J. A. Lyons, of this city, dated August 18th, 1943; answer of J. A. Lyons to the Office of Price Administration at Washington, D. C., dated September 24th, 1943; reply from the Office of Price Administration to J. A. Lyons dated October 1st, 1943.

These, I presume, could all be offered in one group and are authority from the Office of Price Administration at Washington, D. C. to the effect that there can be no fully operated rate established as of March 31st, 1942, with reference to the fact

that such a fully operated rate had been in use at that time, which is the position assumed by the plaintiff in this case.

Mr. Wagner: The same objection, your Honor.

Mr. Gentner: Now will you waive the requirement of bringing these parties in for identification.

Mr. Wagner: No, I won't, Mr. Gentner. You will have to have them.

Mr. Gentner: How about the letters from your office to these gentlemen?

Mr. Wagner: Well, any correspondence from our office to the gentlemen certainly will be in our possession, subject to the [74] same rules of evidence that apply to other matters in our files.

Mr. Gentner: Can you agree that they were written by your office to these gentlemen?

Mr. Wagner: If you would like to give me an opportunity to verify that.

Mr. Gentner: Well, we will ask that these be marked to be offered. We are offering them.

The Court: They may be marked.

Mr. Wagner: The same objection, your Honor.

The Court: I understand.

(The photostatic copies, etc., of correspondence with the Office of Price Administration, consisting of seventeen pages, so offered, was marked Defendants' Pre-Trial Exhibit 20, the pages being marked 20-a to 20-q, both inclusive.)

Mr. Gentner: Now so there will be no misunderstanding as to our position, we have agreed that all

these itemizations submitted by the different bills of A. J. Goerig, and Buckler Company and Lease & Leigland, correctly state the hours of the rentals and the rate charged, but we do not admit the relevancy of those documents because it is our position that no fully operated rate could be established by the fact that the rate may have been charged as of March 31, 1942, and, therefore, those documents would be entirely irrelevant and would serve no useful function at all. And, likewise, we admit the signatures on the Kaiser Company contract [75] and vouchers and their genuineness, so as to relieve of the necessity of bringing the witnesses to identify them, but, again, the same objection as to their relevancy prevails, in that it is our position that this contract with the Kaiser Company and the vouchers do not establish or show any established charge in effect for any operating and maintenance service as of March 31, 1942, show a fully operated rate for a contract entered into prior to that date but no evidence of any established charge in effect as of March 31, 1942, for any operating and maintenance service.

Now I have here a computation of the charges—I will phrase that a little differently—a computation of the rentals furnished to A. J. Goerig, computed in accordance with the OPA regulation and their price-fixing letter of February 5th, 1943, showing the possession time of each piece of equipment and the charge that would be proper under the OPA regulation in their price-fixing letter of February 5th, 1943, to Kuckenberg Construction Company,

showing total charge under this OPA of \$106,-578.55. I have a copy here for you, Mr. Wagner. And I will ask that this be marked for identification, and we offer it in evidence.

(The document so offered, consisting of 15 sheets, the first of which bears date March 9, 1944, with the heading "Sold to A. J. Goerig Construction Company," "Summary of Equipment Possession by Lessee for OPA Regulation #134 Rental Basis," was marked Defendants' Pre-Trial [76] Exhibit 21.

Mr. Gentner: We admit having received payment from the A. J. Goerig Construction Company \$94,501.80. Similarly I have here a like computation for rentals to the various Buckler companies and Lease & Leigland.

Mr. Wagner: Are you offering this first, or are you offering all of these together?

Mr. Gentner: Yes.

Mr. Wagner: I would like to make my objection.

Mr. Gentner: Why not put in the two? They are identical. Here is a copy of the Buckler and Lease & Leigland.

Mr. Wagner: The objection is that they are not properly identified; that they are incompetent, irrelevant and immaterial; that they are not the best evidence; that they serve no purpose as to the issues in this particular matter.

(The computations as to the various Buckler companies and Lease & Leigland, so of-

ferred, being bound in one volume, were marked Defendants' Pre-Trial Exhibit 22.)

Mr. Gentner: Now I am offering here an original contract between Kuckenberg Construction Company and A. J. Goerig.

The Court: Did you intend to make some further statement about Buckler, or about this second job, anyhow? You went on and made a statement about admission of the amount you received in one of the cases. You didn't make a similar statement as to the other. [77] Did you intend to do so?

Mr. Gentner: I just don't know what that total amount was for Buckler. I don't believe I have that amount.

The Court: I am not especially interested. I just thought maybe you had overlooked it.

Mr. Gentner: I don't believe I have that amount, your Honor, of the Buckler and Lease & Leigland. But in any event it is considerably less than the amount shown by the billing here as worked out under the OPA regulation.

The Court: Do I understand your point to be that you have not violated the regulation?

Mr. Gentner: That is right, your Honor. We say that by computing the charges which we were entitled to charge under this regulation, the amount of money that we received and the amount of money that we billed is less than the amount that we were entitled to charge under the regulation and under our letter from Washington, D. C., of February 5th, 1943, and which Mr. Wagner ignores, and our con-

tracts and our prices were figured by Mr. Charles Miller, who was the former Chief Price Specialist of the Office of Price Administration here at Portland, Oregon, for quite a length of time and during the period that this work went on.

The Court: What is the word you used a moment ago? You say Mr. Kuckenberg received a letter which Mr. Wagner "ignored?" Is that the word you used?

Mr. Gentner: Yes. He feels that it is not relevant or pertinent [78] in this case. He is proceeding on a theory that our rate was fixed by virtue of the fully operated rate, which he claims was true under a contract entered into in February, 1942, with the Kaiser Company. Now the Office of Price Administration has taken the position that there can be no fully operated rate established by virtue of the usage in February—in March, 1942, or under the regulation at all, and I think reading the regulation also indicates that there can be no such a rate. We did file in Washington for a rate and were allowed a rate, and under that rate that was allowed by the Office of Price Administration in Washington, D. C., on February 5th, 1943, which, according to their own rules and interpretations became retroactive to any contracts entered into subsequent to this Amendment No. 3, which went into effect on October 22nd, 1943, our prices are less than the amount we are authorized to charge under their fixed figures and rates for us for operating and maintenance service, and also for the bare rental.

This, I might say, is a computation which includes a computation of the bare rental, which is a very intricate and difficult thing to figure out and requires a specialist to do so. I don't believe that I could figure it out myself. We had a price specialist do that for us, whose business it was to do that and who is familiar with it.

Now as an illustration of the manner in which these rates vary, I have here an analysis of the rates for bare rental that would be admissible and permissible, I might say, of the various [79] pieces of equipment rented to Goerig, and I also offer that in evidence. Here is a copy, Mr. Wagner. That shows a variation for tractors of a price of \$3.72 per hour to \$25.61 per hour; a variation in the price for tractors with carryalls, a low of \$5.63 per hour to a high of \$17.65 per hour; and a variation in the price for motor patrol graders of \$1.98 per hour to a high of \$5.10 an hour. The price under the OPA regulation for bare rental varies with the possession time and various other factors and is not a constant rate. The practice prior to the regulation had been to charge so much per hour for the rental but the OPA felt that this was not a proper way of figuring rental, so they have a complicated procedure whereby you have to take into account the possession time and the operating time and a lot of other factors, and then the rate jumps, as I say, anywhere from \$3.72 an hour up to \$25.61 an hour, and like amounts, and when you are all through—you can't tell your price until you are all through with the job, then you have to sit down and

figure all these factors; then you can arrive at the rental charge.

Mr. Wagner: Are you making an offer of that, Mr. Gentner?

Mr. Gentner: Yes, I am offering it.

Mr. Wagner: The same objection.

Mr. Gentner: I might say this was prepared also by Mr. Miller, the price specialist.

(The statement so offered, headed "Hourly Rate Analysis — Bare Rental — Kuckenberg-Goerig Rental, 1942-1943," [80] was marked Defendants' Pre-Trial Exhibit 23.)

Mr. Gentner: And I am offering here the original contract between Kuckenberg and Goerig dated November 30th, 1942, and the agreement for an extra \$2.00 per hour between the same two people, dated January 9th, 1943. On the reverse of the second document is a blueprint of the site of the job, Bremerton.

(The contract so offered, dated November 30, 1942, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company, and accepted by A. J. Goerig Construction Co. and G. W. Walsh, was marked Defendants' Pre-Trial Exhibit 24; and the agreement so offered dated January 9, 1943, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company, and accepted by A. J. Goerig Construction Company, was marked Defendants' Pre-Trial Exhibit 25.)

Mr. Gentner: I am offering here a summary, a recapitulation and itemization of all of the unusual breakage, wear and tear which we claim on the Goerig job. This sets forth, item by item, each part and each repair work that we claim constituted unusual wear and tear on the Goerig job, showing a total of \$33,552.63, and that is supported by the payrolls, time sheets and invoices which I have here, and I presume they are too bulky to be introduced. We support that [81] summary by these documents, and I will offer both the summary and all these documents in evidence in support of our claim of unusual wear and tear.

Mr. Wagner: This, your Honor, is matter that previously has been indicated to be admissible, provided, however, its relevancy to the unusual wear and tear issue could be shown. Now I assume that its introduction at this time would only be subject to the objection along those lines, and we have no objection to the originals. We would like to have the originals introduced, this being only secondary evidence, but we would like to have the objection of relevancy stand thought until trial.

Mr. Gentner: These are original documents, Mr. Wagner. You said they are secondary.

Mr. Wagner: No. The one you are offering?

Mr. Gentner: No, yes; that?

Mr. Wagner: The one you are offering.

Mr. Gentner: That, of course, is a matter to be developed by testimony. It shows our position and is a summary which indicates all the parts that we claim constitute unusual wear and tear.

Mr. Wagner: Then may it be stipulated that the originals will be available at the time of trial in connection with this?

Mr. Gentner: Yes; and we will have them here to introduce.

(The recapitulation and itemization of unusual breakage, wear and tear on the Goerig job, consisting of 12 sheets attached together the first being headed [82] "Bremerton Airport—Kitsap County, A. J. Goerig Contract. Recap—Repairs Bremerton Tractors," etc., so offered, were marked Defendants' Pre-Trial Exhibit 26.)

The Reporter: The others are not to be marked?

Mr. Gentner: I don't see how they can be marked very well. They consist of hundreds of invoices and payrolls.

The Court: You don't need to leave them here.

Mr. Gentner: Invoices and payrolls that would be almost impossible to identify, I presume. I have here a letter from H. L. Morian, Major of the Corps of Engineers, addressed to Kuckenberg Construction Company from Seattle, Washington, dated March 24th, 1943, threatening to blacklist the Kuckenberg Construction Company if they remove their equipment from the Goerig job, and I offer that in evidence.

Mr. Wagner: What might be the purpose of that, Mr. Gentner?

Mr. Gentner: Well, I think that would show——

Mr. Wagner: I don't see that is has any relevancy here.

Mr. Gentner: Well, I suppose as long as you admit the unusual wear and tear I don't think it would have. I will withdraw that. I have here a picture of the "Caterpillar" Diesel D8 tractor, which I think would be helpful in understanding the testimony in regard to unusual wear and tear. I will offer that in evidence.

(The photograph of "Caterpillar" Diesel D8 Tractor so offered was thereupon marked Defendants' Pre-Trial [83] Exhibit 27.)

Mr. Gentner: As well as three photographs here of tractors and carryalls. The testimony in regard to unusual wear and tear will develop technical testimony in regard to parts that were worn out due to the unusual conditions, and an understanding of them would be easier if there were these pictures available that can be used by the witnesses who will testify as to the particular parts that were worn out and the manner in which the unusual wear and tear occurred.

Mr. Wagner: Are these on the particular job?

Mr. Gentner: No, they are not.

Mr. Wagner: Well, I would not have any objection to photographs——

Mr. Gentner: They are merely pictures of—we have none of them on that job. They are merely pictures of the equipment, showing what the equipment was that is involved.

Mr. Wagner: But I think one picture of the

equipment is sufficient. I don't believe that pictures of other locations and other work is relevant.

Mr. Gentner: I might say that they are also relevant for the purpose of showing the type of work and the type of soil and conditions that this equipment is suited for, and that will contrast with the conditions that were present on the Goerig job. Now part of the unusual wear and tear will be due to the soil conditions partially up at the Bremerton job and also to the manner in which they were used. Now these photographs illustrate soil, normal soil [84] conditions and normal usage; that is, usage in a straightaway rather than in a circular loading proceeding, and they are also offered for that purpose.

Mr. Wagner: I don't see that photographs of other work and other jobs have any place at all in this trial and I object.

The Court: They may be marked.

Mr. Gentner: Well, we would like them marked for identification and we offer them. You were agreeable to the picture of the tractor, were you?

Mr. Wagner: No objection to the tractor picture.

(Thereupon the photograph of "Caterpillar" Diesel D8 Tractor, so offered, was marked Defendants' Pre-Trial Exhibit 27, and the three photographs of Tractors and Carryalls, so offered, were marked, respectively, Defendants' Pre-Trial Exhibits 28, 29 and 30.)

Mr. Gentner: I have here a letter from the Con-

tinental Casualty Company, Seattle Branch, to Henry Kuckenberg, dated March 10th, 1944, attached to which is a copy of the bond furnished by A. J. Goerig on this particular job that the equipment was rented on, showing that A. J. Goerig was an individual rather than a partnership. We will offer that.

Mr. Wagner: Well, is there any particular point involved?

Mr. Gentner: I think it is claimed here that Goerig—we have been sued as having rented to a partnership and we say that we dealt [85] with an individual.

Mr. Wagner: Didn't we make a correction in our pleadings to that effect?

Mr. Gentner: No, you did not.

Mr. Wagner: I don't see that it has any relevancy. We certainly would have the Court's permission to amend in case that were the case, and it has no bearing on any particular issue involved here.

The Court: If that don't need to come in then.

Mr. Gentner: We will offer that.

The Court: It won't need to come in, in view of his admission.

Mr. Gentner: Now I have here a series of invoices of—I will count them—a series of requisitions, rather. These are requisitions from George H. Buckler, Contractor, to Kuckenberg Construction Company, which we are offering to show that they have on their face and as part of them a requirement that the price is not to exceed OPA ceiling

prices, and these same requirements govern all of the Buckler requisitions and I will offer these.

Mr. Wagner: These deal entirely with the work?

Mr. Gentner: The Buckler work.

Mr. Wagner: With the Buckler work?

Mr. Gentner: That is correct.

Mr. Wagner: That is the subject of this suit?

Mr. Gentner: Yes, the subject of this suit.

Mr. Wagner: May I ask, are these all of the requisitions?

Mr. Gentner: No, they are not all of them. All of them probably [86] run into, I imagine, some hundreds. I have just taken a quantity at random. I don't know how many there are. I didn't count them. They are offered for the purpose of showing that this requirement governed all of the Buckler business; that is, right on the requisition was a requirement that the price was not to exceed the OPA price ceiling.

Mr. Wagner: Well, I have no objection to the point that you are making for it but I certainly think they are irrelevant unless they are the subject of this suit.

Mr. Gentner: Yes, they are.

Mr. Wagner: In some way connected with it.

Mr. Gentner: Yes, they are.

Mr. Wagner: Now if they are picked at random I think we ought to have all of them that are connected with this action instead of only a few at random. I haven't any objection to the point Mr. Gentner makes as to what they have on their face,

but most assuredly I think if we are going to have a part or some that are picked at random out of the requisitions and they state prices, I think that we ought to have all of them.

Mr. Gentner: I think Mr. Kuckenberg says that is all that we have. You have some, don't you, Mr. Wagner?

Mr. Wagner: Not that I know of.

Mr. Gentner: We turned over all the rest of our Buckler records to you and this is all we have. You received the rest.

Mr. Wagner: Very well. [87]

Mr. Gentner: That is all we have, and the rest of the Buckler requisitions, each shows a requirement that the price is not to exceed the OPA prices.

Mr. Wagner: Very well. We have no objection. Then that is all?

Mr. Gentner: Yes, sir.

(The requisitions from George H. Buckler, Contractor, to Kuckenberg Construction Company, consisting of 29 sheets, so offered, were marked Defendants' Pre-Trial Exhibit 31, pages numbered 1 to 29, both inclusive.)

Mr. Gentner: I wanted to call the Court's attention to the fact that the copies of the regulation which were furnished to the Court by the Office of Price Administration vary in one respect from the printed copy which I think probably is the authentic copy, in that there is a colon after the word "following" in section 1399.6, subsection (2) (b) (1),

where it reads "the maximum charge for such service shall be a charge which has been determined on the basis of the following," there is a colon there in the printed copy but none in the copy which has been furnished to Your Honor, and in the copy that has been furnished to Your Honor it would read, "which has been determined on the basis of the following labor rates in effect on March 31," whereas it should read, "on the basis of the following:" labor rates in effect and material prices in effect. So that if that should come into question I believe that the true regulation has the colon in it. And I would like at this time also [88] to ask whether Mr. Wagner will concede that there was no specific authority from the Administrator for the institution of this action against the Kuckenberg Construction Company for treble damages.

Mr. Wagner: The point was raised at the last conference, your Honor, and since that time the delegation of authority has been introduced in the Wheeler case. That same situation will apply in this matter likewise; that is, namely, the Administrator's General Order No. 3 as amended, and the Federal Register numbers I don't recall right off hand. There was a teletype redelegation of that authority under date of June 4th, 1943, which supplemented a memorandum of April 23rd, 1943; it was the final authority memorandum in connection with the delegation of authority to institute actions in proceedings. That same situation, your Honor, will apply in this case as in the Wheeler case.

The Court: Mr. Wagner, this will help both of you. This is a little excerpt from the Wheeler proceedings, if you want it. There is the reference to Federal Register, if you want to put that in this record.

Mr. Wagner: Thank you, your Honor.

Mr. Gentner: I don't believe you made any specific answer to my question, Mr. Wagner. Do you concede there was no specific authorization by the Administrator to institute this action for treble damages?

Mr. Wagner: No. The situation, Mr. Gentner, is just as I have stated in connection with the institution of this action. [89]

Mr. Gentner: I don't think you have answered my question whether you do or don't.

Mr. Wagner: I am not on the witness stand, Mr. Gentner. I can't make it any more clear, I don't believe, that the authority to institute this action emanated from delegation of authority as found in Federal Register 7281, issued the 2nd day of October, 1942.

Mr. Gentner: I think I was present when you brought that general order out in the Wheeler case.

Mr. Wagner: That is right.

Mr. Gentner: So that I am familiar with that claim there.

Mr. Wagner: That is the authority upon which this action was instituted, and no other.

The Court: That answers your question.

Mr. Gentner: That does, your Honor. And I would like to ask whether you will concede that

there has been no other action filed against anybody else for treble damages for alleged overcharges of rentals of road construction and maintenance equipment here in this district?

Mr. Wagner: I think the Court records will speak for themselves, Mr. Gentner.

Mr. Gentner: That is all that we have, your Honor.

Mr. Wagner: In connection with the last point, I would like to have an opportunity to supplement this record with a copy of the teletype of June 4th, as was done in the Wheeler case. I don't have a copy of it here and I would like to have it introduced. [90] Likewise I would like to have the record include those provisions of the General Order No. 3 as are relevant, and also the material portions of the memorandum from San Francisco to the Portland District Office under date of April 23rd, 1943, as was done in the Wheeler case.

The Court: Yes.

Mr. Gentner: I have one other matter, your Honor. There is still pending before this Court the motion to quash the subpoena duces tecum directed to five persons, including Mr. Wagner and various others in connection with the Oregon Transfer Company, and that motion I believe has not been disposed of.

The Court: I won't rule on it. I am not prepared to rule on it at this time.

Mr. Gentner: All right.

The Court: Mr. Gentner has finished now. Any-

thing you want to say this morning, Mr. Wagner? Mr. Bragg, retrieve my little book.

Mr. Wagner: Thank you, your Honor. No, your Honor. I believe with the reservations that I just made that constitutes our case.

The Court: I believe on Wednesday the Wheeler case is to be argued.

Mr. Wagner: Yes, your Honor.

The Court: Will you be among those present, Mr. Gentner?

Mr. Gentner: I rather imagine so, your Honor.

The Court: We will at least have a one-man gallery. All right. [91] Thank you.

(Thereupon, at 11:35 A. M., the foregoing proceedings were adjourned.)

[92]

[Title of District Court and Cause.]

Civil No. 2290.

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand the proceedings had upon the pre-trial conference had in the above entitled cause on Monday, May 22, 1944, and on Monday, June 12, 1944, in the above entitled Court, before the Honorable Claude McColloch, Judge, and thereafter prepared a typewritten transcript from my shorthand notes so taken, and the foregoing and hereto attached 72 pages of typewritten matter, pages numbered 21 to 92, both inclusive, contains a full,

true and accurate transcript of my shorthand notes so taken by me as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 19th day of August, 1944.

/s/ ALVA W. PERSON

Court Reporter.

[93]

[Title of District Court and Cause.]

Portland, Oregon, Tuesday, November 14, 1944.

10:16 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. F. E. Wagner appearing on behalf of the plaintiff.

Mr. A. W. Gentner appearing on behalf of defendants.

TRIAL PROCEEDINGS

The Court: Did you intend to include in the pre-trial order, Mr. Gentner, that the offense, if any, was not willful? [94]

Mr. Gentner: I am sorry, I didn't understand, your Honor.

The Court: Did you intend to include the question of willfulness in this pre-trial order under the amendment to the statute?

Mr. Gentner: Yes, your Honor.

The Court: That is not in the pre-trial order. That should be stated as an issued if you intend to claim that.

Mr. Gentner: I thought we had put it in. I am sorry.

The Court: Just put it in during the noon hour. You will have to rewrite the last page. Then I will sign it. You had better put it in in line with the statute. You will find in the Wheeler case the statute was followed pretty carefully there.

Mr. Gentner: I will do that, your Honor.

Mr. Wagner: Just a few remarks, your Honor. The Court will recall that the subject of the controversy is rental of construction and road maintenance equipment. The matters involved here are particularly free from different agreements or contracts for the performance, and the furnishing of this type of services by Mr. Kuckenberg and his concern. One involves the performance of a contract up or near Bremerton, Washington, in the construction of an airfield. The other is similar services performed by the Buckler Construction Company, and the third is similar services performed for Lease & Leigland, who are also general contractors. [95]

The state of the pleadings, to review just a little bit, originally there was filed an application for an order requiring the inspection of certain records of the Kuckenberg Construction Company. The order was granted and certain records were submitted. As the result of the construction of those records and the calculations and computations made there-

from the excessive or illegal charges were found, as contended by plaintiff, in connection with the Lease & Leigland and the Buckler Construction Company services. As to those services the defendants have consistently claimed the privilege against self-incrimination.

The other, or the first contract, namely, with the Goerig Construction Company, was taken from records other than the defendants' and of course no claim of privilege there is being made.

Now originally a complaint was filed in this case, numbered 2290, against the Kuckenberg Construction Company, involving excessive charges only in connection with the Kuckenberg Construction Company contract.

As a result of the inspection of the records an amended complaint was filed in that case adding the excessive charges in the other two instances. To this amended complaint defendants filed their answer raising two defenses, the general denial and the claim of the privilege, and then following that the defendants served plaintiff with certain [96] interrogatories to be propounded to T. H. Fraser, and also an application for subpoena duces tecum. Subpoena was issued, a subpoena directed to myself, George Black, Jr., Charles B. Wegman, and certain officials of the Oregon Transfer Company, for disclosure of certain records and information.

To that the plaintiff filed a motion to quash. I believe that the Court still has that situation under advisement.

There was also filed thereafter by the defendants, pursuant to the Rules of Civil Procedure, a request for admission of facts and genuineness of documents, and which the plaintiff answered denying the request, and then there was a motion by the defendants for the production of documents and for inspection and photographing, also filed pursuant to the Federal Rules, which the Court took under advisement; and thereafter the pre-trial order was settled as between Mr. Gentner and myself.

It is, briefly, plaintiff's position, and it is probably disclosed quite clearly by the pre-trial order, that the plaintiff relied upon certain established rates which were in effect as between the Kaiser Shipbuilding Corporation and the Kuckenbergers on the 31st day of March, in 1942. Those rates were taken by the Administrator as being the selling prices for these services for the Kuckenberg Construction Company. [97]

Another situation developed, as far as Kuckenberg Construction Company was concerned, subsequent to that time, namely, during January of 1943 Kuckenberg Construction Company filed an application purportedly pursuant to certain provisions of the applicable price regulation, M.P.R. 134, in order to establish and have approval of certain operating rates which they claimed to be theirs. Approximately thirty days later the Washington Office of Price Administration denied those particular rates but set forth other rates, to which it indicated no objection would be made.

It is our position in connection with that particular application, and the subsequent denial of it, that inasmuch as the Kuckenberg Construction Company had in effect on March 31st, in 1943, or March of '42, certain rates for these particular services, that those would be the rates, they being required by the regulations to use these as the ceiling rates instead of their filed rates or their applied-for rates, or instead of the allowed rates by the Washington office.

That, primarily, is the meat, I believe, of the whole case in connection with rates.

Now the price regulation, as I indicated, was Maximum Price Regulation 134. I believe there was submitted for your Honor's file copies of the regulation. That regulation sets forth particularly in connection with operating and [98] maintenance rates in Section 1399.6 the various methods of establishing an operator's rates. This portion of the regulation became effective October 22nd, 1942, and by virtue of Amendment 3 sets forth the three particular methods of establishing rates. In Section A is set forth the method which the plaintiff assumes and urges is the correct method; in Section B is set forth another method of establishing rates, that is by application; and Section C sets forth a similar or third method by application to the Washington office for the establishment of rates.

Now it is plaintiff's position that Section B does not apply where there were different operator established rates in effect on March 31st, 1942.

There is one other situation that enters into this

case that is probably entirely a question of fact, and that is the contention of the defendants that in the performance of the work for the Goerig Construction Company there were unusual circumstances and unusual wear and tear accorded the equipment by virtue of the terrain and the ground that had to be worked. The extent of those is conceded to be subject to offset as to the prices that are accorded under the established rates, as contended by the plaintiff; subject, however, to proof, clear and explicit, that the charges actually were the result of extraordinary wear and tear on equipment.

Now just how defendant intends to establish that [99] part of his case I don't yet know, although he has indicated that there may be some difficulty in segregating the rates for that particular thing.

It is our contention, further, that in the event that defendants' contention that a filed or approved rate should govern in this particular case, that extraordinary wear and tear in any event should also be subject to an application and approval by the Washington office in establishing that rate. That was not done in this case—in any case.

There is also a question I believe involving an amount which was billed by the Kuckenberg Construction Company to the Goering Construction Company, all of which was not paid. The question presented is whether or not that should be considered in arriving at the excessive consideration charged by the Kuckenberg Construction Company.

Now it is not exactly clear to me, as far as the defendants' contentions are concerned, in connec-

tion with their desire to examine other operators' records. In connection with their desire to examine other operators' records in this area as to whether they are trying to establish their own rates by a comparable rate, or whether they are attempting to inject into the controversy the element of discrimination. It is not just exactly clear to me, although previous indications were that the discovery element does [100] have a bearing in this case, as far as the defendants are concerned.

I believe, your Honor, that that covers the situation as we see it from the plaintiff's view.

Mr. Gentner: I think the defendants, however, are pretty well covered by the contentions set forth in the pre-trial order, with the exception of the fact that it will be our contention that, if any violation is established, it was not willful, and we would like to embody that in the pre-trial order.

Mr. Wagner: I have no objection to the amendment of the pre-trial order to that effect. Do we have the pre-trial exhibits available?

The Court: In a case like this the practice has been found to be better just to introduce all of the exhibits identified at pre-trial, subject to the objections, if any, that may have been set out at the pre-trial hearing.

Mr. Wagner: That is perfectly agreeable with me.

Mr. Gentner: That is agreeable with me, your Honor.

The Court: The exhibits will have the same

numbers as trial exhibits as they do as pre-trial exhibits, 1, 2, 3, and so on.

Mr. Wagner: The plaintiff, then, first offers contract between the Kaiser Company——

The Court: No. You just put them in in gross.

[101]

Mr. Wagner: Very well, then.

The Court: All the exhibits are in now as they are, exhibits on both sides, bearing the same numbers as given at pre-trial, subject to the objections, if any, stated at the time of the pre-trial, except where objections may have been reserved, and, if so, additional objections may be stated now or at any time during the trial.

Mr. Wagner: Very well.

The Court: Tax cases are very much like this case, and that is the practice we have developed in those cases. It makes for shortness of the proceedings.

Mr. Gentner: I would just like to examine what objections have been made.

The Court: You don't need to be on the alert about that right now. You can do it at any time during the day or at the conclusion of the trial.

Mr. Wagner: Well, it would seem to me that, save for the objections that the defendants have interposed, the plaintiff's case is all in, then.

The Court: Well, I rather thought so from running through the file again in the last few days.

Mr. Wagner: Yes.

The Court: Your case is in on the records.

Mr. Wagner: Is there any matter, Mr. Gentner, that, as far as plaintiff's case is concerned, you would care to have [102] proof on?

Mr. Gentner: No, there is not. I did not admit the relevancy of the exhibits, Plaintiff's exhibits, and I don't know whether I interpose——

The Court: Well, I am going to say in this case, as I have done in the tax cases, without going through all of these things now I am going to admit everything, subject to the objections that were stated at the pre-trial, and those objections may be admitted as being wrong at this time, so your position is reserved here now at the trial.

Mr. Gentner: I don't know if I had objected properly——

The Court: Now then, you can go further. You can refresh yourself at any time during the day, or during the noon hour, and save your objections. I think maybe the ruling would be the same.

Mr. Gentner: That is all right, but would it be all right if I would state some objections now, subject to your rule?

The Court: You don't need to state them now. You may state them to the Reporter at any time.

Mr. Gentner: I see.

The Court: It is just a matter of making your record. That is all.

Mr. Gentner: I see.

The Court: Of course, when it comes to arguing this case, and decision, I am going to have to choose between the con- [103] flicting theories; I appreciate that; the theories that your objections, pro and con,

develop here, and at present everything is in just like in an administrative proceeding. So if you have any testimony on the factual issues, Mr. Gentner, that have not been made in the record, it is time for you to put on your witnesses, I think. Mr. Wagner, if he changes his mind later that his case is not complete on the record, can come in then. We will have no trouble about that.

(The contract between Kaiser Company, Inc., Contractor, and Kuckenberg Construction Co., Subcontractor, etc., having been marked Plaintiff's Pre-Trial Exhibit 1, was further marked "and trial";

The certified copy of payment voucher dated April 18, 1942, payable to Kuckenberg Construction Company, with papers attached, marked Plaintiff's Pre-Trial Exhibit 2, was further marked "and trial";

Letter dated January 15, 1943, Kuckenberg Construction Company to Construction and Road Maintenance Equipment Board, OPA, Washington, D. C., marked Plaintiff's Pre-Trial Exhibit 3, was further marked "and trial";

Letter dated February 5, 1943, Walter Shoe-[104] maker, Head Construction and Extraction Equipment Section, Machinery Branch, OPA, marked Plaintiff's Pre-Trial Exhibit 4, was further marked "and trial";

Statement, five sheets, first head "Kuckenberg Rentals to A. J. Goerig Construction Co., March 10, 1944," marked Plaintiff's Pre-Trial Exhibit 5, was further marked "and trial";

Statement, two sheets, first headed "Kuckenberg Rentals to Buckler Company, etc. Andrew Lee Rapp 3/16/44," marked Plaintiff's Pre-Trial Exhibit 6, was further marked "and trial";

Statement, two sheets, first headed "Kuckenberg Rentals to Lease & Leigland. Andrew Lee Rapp, March 20, 1944," marked Plaintiff's Pre-Trial Exhibit 7, was further marked "and trial";

Statement headed "Cost Summary — A. J. Goerig Construction Co., Bremerton Airport Rental of Equipment," marked Defendants' Pre-Trial Exhibit 8, was further marked "and trial";

Statement headed "Portland Payroll Totals—December 12, 1942, to June 19, 1943," [105] marked Defendants' Pre-Trial Exhibit 9, was further marked "and trial";

Statement dated April 30, 1943, addressed to A. J. Goerig Construction Company and headed "Hauling Charges", marked Defendants' Pre-Trial Exhibit 10, was further marked "and trial";

Statement headed "Summary of Invoices", three typewritten sheets, marked Defendants' Pre-Trial Exhibit 11, was further marked "and trial";

Statement dated October 19, 1943, signed Henry A. Kuckenberg and addressed to Prentiss M. Brown, Price Administrator, etc., marked Defendants' Pre-Trial Exhibit 12, was further marked "and trial";

Statement dated January 6, 1944, signed Harriet A. Kuckenberg and addressed to Chester Bowles, Administrator of the Office of Price Administration,

etc., marked Defendants' Pretrial Exhibit 13, was further marked "and trial";

Statement dated January 6, 1944, signed Henry A. Kuckenberg, addressed to Chester Bowles, Administrator of Office of Price [106] Administration, etc., marked Defendants' Pre-Trial Exhibit 14, was further marked "and trial";

Letter, May 5, 1944, Kuckenberg Construction Co., to Walter Shoemaker, OPA, Washington, D.C., marked Defendants' Pre-Trial Exhibit 15, was further marked "and trial";

Letter dated May 19, 1944, Kuckenberg Construction Co. to Walter Shoemaker, OPA, Washington, D.C., marked Defendants' Pre-Trial Exhibit 15, was further marked "and trial";

Letter dated May 24, 1944, Walter Shoemaker, Head Construction and Extraction Equipment Section Machinery Branch, to Kuckenberg Construction Company, marked Defendants' Pre-Trial Exhibit 17, was further marked "and trial";

Letter dated June 1, 1944, Kuckenberg Construction Co. to Walter Shoemaker, Head Construction and Extraction Equipment Section, etc., marked Defendants' Pre-Trial Exhibit 18, was further marked "and trial";

Photostatic copies of five letters, OPA correspondence, marked Defendants' Pre-Trial Exhibits 19-A to 19-E, were further marked [107] "and trial";

Photostatic copies, etc., of correspondence with OPA, seventeen pages, marked 20-A and 20-Q, both inclusive, marked Defendants' Pre-Trial Exhibit 20, were further marked "and trial;"

Document dated March 9, 1944, headed "Sold to A. J. Goerig Construction Company", "Summary of Equipment Possession by Lessee for OPA Regulation #134 Rental Basis", fifteen sheets, marked Defendant's Pre-Trial Exhibit 21, were further marked "and trial";

Computation as to various Buckler Companies and Lease & Leigland, marked Defendants' Pre-Trial Exhibit 22, was further marked "and trial";

Statement headed "Hourly Rate Analysis—Bare Rental—Kuckenberg - Goerig Rental, 1942 - 1943", marked Defendants' Pre-Trial Exhibit 23, was further marked "and trial";

Contract dated November 30, 1942, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company, accepted by A. J. Goerig Construction Co. and G. W. [108] Walsh, marked Defendants' Pre-Trial Exhibit 24, was further marked "and trial";

Agreement dated January 9, 1942, signed Kuckenberg Construction Company, Henry Kuckenberg, Partner, addressed to A. J. Goerig Construction Company and accepted by A. J. Goerig Construction Company, marked Defendants' Pre-Trial Exhibit 25, was further marked "and trial";

Statement headed "Bremerton Airport—Kitsap County, A. J. Goering Contract. Recap.—Repairs Bremerton Tractors", etc., 12 sheets, marked Defendants' Pre-Trial Exhibit 26, was further marked "and trial";

Photograph of "Caterpillar" Diesel D8 Tractor,

marked Defendants' Pre-Trial Exhibit 27, was further marked "and trial";

Photographs of Tractors and Carryall, marked Defendants' Pre-Trial Exhibit 28, was further marked "and trial";

Photograph of Tractor, Carryall, etc., marked Defendants' Pre-Trial Exhibit 29, was [109] further marked "and trial";

Photograph of Tractor, Carryall, etc., marked Defendants' Pre-Trial Exhibit 30, was further marked "and trial"; and

Requisitions from George H. Buckler, Contractor, to Kuckenberg Construction Company, 29 sheets, numbered 1 to 29, both inclusive, marked Defendants' Pre-Trial Exhibit 31, was further marked "and trial".)

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 1

Kaiser Company, Inc.
Vancouver, Washington

July 3, 1942

CHANGE ORDER "D"
SUBCONTRACT No. 3

Kuckenberg Construction Company
11104 N. E. Holman Street
Portland, Oregon

Gentlemen:

1—Reference is made to your Contract No. 3
"Equipment Rental", dated February 9, 1942.

2—To expedite the construction of facilities in

the Vancouver shipyard, it has been necessary to work some of your equipment in excess of the requirements provided in Subcontract No. 3.

Caterpillar Tractor Dozer ~~#~~¹¹G10C and eight yard Carryall was rented from you under the terms of Change Order "A", Item 4. We have used the Caterpillar Tractor Dozer without the Carryall for approximately 1,650 hours.

Caterpillar Tractor #1 with Carryall #56-B, capacity 25 yards, rented from you under the terms of Change Order "B", Item 9, has been used an additional approximate sixty (60) hours.

Two (2) Austin Western blades were rented from you in accordance with Contract No. 3, Payment Schedule, Item I.

Blade #70 has been used approximately 560 hours in excess of the Payment Schedule, Item (1).

Blade #69 will be used 1500 hours in excess of the Payment Schedule, Item (1).

In addition to the above, you have been required to furnish one D-8 Caterpillar Tractor and twenty five yard Carryall No. 66-C for approximately 1,000 hours and one D-7 Caterpillar Dozer No. 52 for approximately 1500 hours.

Payment for the items set forth above will be made as outlined in Paragraph (3) below.

3—Subcontract No. 3, Paragraph 16, "Payment Schedule," is hereby amended by the addition of New Items (Nos. 10, 11, 13, 14 and 15) as follows:

Item	Description	Equipment Rental	Labor, Fuel, Oil, Gas, Repairs, Ins.	Total Unit Price	Approx. Quants.	Approx. Amount
	Rental of equipment to include in each case, operators, fuel, oil, gas, repairs and insurance					
10	D-8 Caterpillar Tractor and 25 Yd. Carryall #66-C Caterpillar: Serial #8R6585P Carryall: Model W-Serial #S6330WC. Replacement Value: Cat: \$12,500. Carryall: \$7,500.	\$5.90 hr.	\$4.70 hr. Overtime: .76	\$10.60	1,000 hrs.	\$10,600.
11	D-7 Caterpillar Dozer # 52. Serial #9G5904ST. Replacement Value: \$12,000.	\$4.90 hr.	\$3.70 hr. Overtime: .76	\$ 8.60	1,500 hrs.	12,900.
12	One Caterpillar Tractor Dozer. #D-7 - Serial #G10C, without Carryall. Replacement Value: \$10,000.	\$4.90	\$3.70 Overtime: .76	\$ 8.60	1,650 hrs.	14,190.
13	Caterpillar #1 with Carryall #56-B, 25 Yds. Replacement Value: \$20,000.	\$5.90	\$4.70 Overtime: .76	\$10.60	60 hrs.	636.
14	Austin Western Blade #69. Replacement Value \$10,000.	\$3.90	\$3.70 Overtime: .76	\$ 7.60	1,500 hrs.	11,400.
15	Austin Western Blade #70. Replacement Value: \$10,000.	\$3.90	\$3.70 Overtime: .76	\$ 7.60	560 hrs.	4,256.
Total Amount:						\$53,982.00

4—This Change Order involves an approximate increase in the contract of \$53,982.00.

5—It is understood and agreed that all other terms and conditions of said Subcontract No. 3 and Change Orders "A", "B", and "C" thereto, as modified by Change Order "D", shall be and remain in full force and effect.

6—Therefore, if the foregoing modifications of said Subcontract No. 3 are satisfactory, please note your acceptance in the space provided below.

Very truly yours,

KAISER COMPANY, INC.

Vancouver Yard

/s/ M. MILLER

M. Miller

Assistant General Manager

The foregoing modifications are hereby accepted.

UCKENBERG CONSTRUC-
TION COMPANY

(Subcontractor)

By /s/ HENRY KUCKENBERG

Title—Partner

Witnessed By:

/s/ G. M. LEGG

MM:SLC:dbj

Approved

U S M C

/s/ O. A. MECHLIN

Res Plant Engr

7/25/42

Kaiser Company, Inc.
Vancouver, Washington

September 7, 1942

CHANGE ORDER "E"
SUBCONTRACT No. 3

Kuckenberg Construction Company
11104 N. E. Holman Street
Portland, Oregon

Gentlemen:

1—Reference is made to your Subcontract, our No. 3, "Equipment Rental," dated February 9, 1942.

2—To expedite the construction of facilities in the Vancouver Yard, you were authorized and directed by representatives of the Kaiser Company, Inc., to remove from the said Yard for necessary repairs one (1) Austin-Western Blade No. 69 and one (1) D-8 Caterpillar Tractor and 25-yard Carryall No. 66-C, and replace the equipment with one (1) Caterpillar Motor Patrol No. 604 and one (1) D-8 Caterpillar Dozer No. 55. Payment for the additional equipment will be made as outlined in Paragraph (3) below.

3—Subcontract No. 3, Paragraph 16, "Payment Schedule," is hereby amended by the addition of New Items (Nos. 16 and 17) as follows:

Item	Description	Equipment Rental	Labor, Fuel, Oil, Gas, Repairs, Ins.	Total Unit Price
	Replacement Equipment			
16	Caterpillar Motor Patrol #604. Serial #9K4751. Re- placement Value \$10,000	\$2.90 per hr.	\$4.70 per hr.	\$7.60 per hr.
17	D-8 Caterpillar Tractor Dozer #55. Replacement Value \$12,500	4.90 per hr.	3.70 per hr.	8.60 per hr.

4—This Change Order involves no change in the approximate total contract amount.

5—It is understood and agreed that the accrued rental on the Austin-Western Blade #69 and D-8 Cat. Tractor and Carryall #66-C in the amount of \$4,748.25 and \$2,989.00, respectively, shall be applied against the rental purchase value of the Cat. Motor Patrol #604 and D-8 Cat, Tractor Dozer #55.

6—In the event that this contract is renegotiated under the provisions of Section 403 of Public Law 528, approved April 28, 1942, (Sixth Supplemental National Defense Appropriation Act, 1942) the Subcontractor hereby agrees:

(1) If such renegotiation results in a reduction of the contract price, the amount of such reduction shall, as directed by the Chairman of the United States Maritime Commission:

(a) Be deducted by Contractor from payments to Subcontractor under this contract; or

(b) Be paid by Subcontractor directly to the Government; or

(c) Be repaid by Subcontractor to Contractor.

(2) Contractor shall not be liable to Subcontractor for or on account of any amount repaid to

Contractor or paid to the Government by Subcontractor or deducted by Contractor from payments under this contract, pursuant to directions from the Chairman of the United States Maritime Commission in accordance with the provisions of this Article, and Subcontractor will pay to Contractor all amounts withheld by the United States from Contractor and all amounts paid to the United States by Contractor as a result of such renegotiation.

(3) The term "Chairman of the United States Maritime Commission" as used in this Article includes any duly authorized representative of such chairman.

: 7—It is understood and agreed that all other terms and conditions of said Subcontract No. 3, except as modified by Change Orders "A", "B", "C", "D" and "E", shall be and remain in full force and effect.

8—Therefore, if the foregoing modifications of the said Subcontract No. 3 are satisfactory, please note your acceptance in the space provided below.

Very truly yours,

KAISER COMPANY, INC.

Vancouver Yard

/s/ REX C. HAMBY

Rex C. Hamby

Office Manager

The foregoing modifications are hereby accepted:

KUCKENBERG CONSTRUCTION COMPANY

(Subcontractor)

By /s/ HENRY KUCKENBERG

Title—Partner

Witnessed by:

/s/ ESTHER WEIBEL

RCH:SLC:jsm

Approved

U S M C

O. A. MECHLIN

Res Plant Eng'r.

10/5/1942

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 3

KUCKENBERG CONSTRUCTION CO.

General Contractors

Bus. Phone WE 2259

11104 Northeast Holman Street

Portland, Oregon

January 5, 1943

Construction and Road Maintenance Equipment Board,
Office of Price Administration, Washington, D.C.

Gentlemen :

We herewith submit rental rates, which apply to road maintenance equipment on a fully operated basis. The following rates have been in effect during the year 1942, and are being used by us at this time in this locality.

Rental—Name of Equipment	Rate per hr. bare equip.	Rate per hr. Labor & Ins.	Cost per hr.		Total charge per hr. fully operated equipment
			Gas—Oil Grease & Lubricants.	Repairs, Mainten. Tires—cable service & supervision	
Crawler Deisel Tractor 89-130 HP. with lights, 4 drum power unit, etc.....	\$2.70	\$1.86	\$1.28	\$3.30	\$9.14
With Angle dozer	3.11	1.86	1.28	3.52	9.83
Crawler Deisel Tractor 72-89 H.P. with lights 2 drum power unit & Dozer....	2.45	1.86	1.15	3.14	8.60
Crawler Deisel tractor 52-62 H.P. with attachments	1.76	1.86	1.15	2.29	7.06

Rental—Name of Equipment	Rate per hr. bare equip.	Rate per hr. Labor & Ins.	Cost per hr. Gas—Oil Grease & Lubrics.	Repairs, Mainten. Tires—cable service & supervision	Total charge per hr. fully operated equipment
Motor—(Grader Deisel—all wheel drive and steer with attachments.....	\$2.01	\$1.86	\$.90	\$3.23	\$ 8.00
Motor—(Grader Deisel—Heavy Dty.....	1.78	1.86	.90	3.46	8.00
Scrapers—16-20½ cu. yd. struck.....	2.19n		.41	2.03	4.63
¾ Yd. Shovel or Hoe with lights.....	1.72	3.32	1.48	3.90	10.42
¾ Yd. Dragline with extra boom and lights	1.91	3.32	1.48	3.71	10.42
1½ yd. Deisel dragline with lights.....	3.09	3.32	2.12	3.97	12.50
10 ton—3 wheel roller—Gas	1.60	1.86	1.10	1.65	6.21
Tractor trailer Units 10-14 yds. with power unit and lights	3.77	1.86	2.03	4.84	12.50
2½ Yd. Deisel Shovel or Dragline.....	6.56	3.61	2.02	4.66	16.85

Respectfully submitted,

KUCKENBERG CONSTRUCTION CO.

.....
Partner

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 4

Office of Price Administration
Washington, D.C.
Federal Office Building No. 1
Room 6225

Feb. 5, 1943

In reply refer to: 694:2:PEA MPR 134

Kuckenberg Construction Co.
11104 Northeast Holman Street
Portland, Oregon

Attention: Mr. Henry Kuckenberg, Partner

Gentlemen:

This will acknowledge receipt of your letter of January 5, 1943, in which you submit rental rates applying to road maintenance equipment leased by you on a fully operated basis.

Section 1399.7 of Maximum Price Regulation No. 134 provides that lessors must bill separately the bare rental rates not in excess of the maximum rates listed in Appendix A and operating and maintenance service charges as established by this Office. This Section operates, therefore, to prevent any establishment of a fully operated rate. With respect to operating and maintenance service charges to cover such services as operating crew, fuel, lubrication and repairs other than normal wear and tear, this Office must disapprove the charges suggested by you. After careful consideration of the cost data which you submitted together with information this

Office has obtained from many other lessors of similar equipment, this Office will not object to your using the following rates per operating hour:

Crawler Diesel tractor 89-130 H.P. with lights	
4 drum power unit	\$ 4.30
Crawler Diesel tractor 89-130 H.P. with angle	
dozer	4.40
Crawler Diesel tractor 89-130 H.P. with scraper.....	4.90
Crawler Diesel tractor 72-89 H.P. with lights	
2 drum power unit and dozer.....	3.90
Crawler Diesel tractor 52-62 H.P. with attachments	3.60
Motor—grader Diesel—all wheel drive and steer	
with attachments	3.50
Motor—grader Diesel—Heavy duty	3.50
$\frac{3}{4}$ yd. shovel or hoe with lights.....	5.50
$\frac{3}{4}$ yd. dragline with extra boom and lights.....	5.50
$1\frac{1}{2}$ yd. Diesel dragline with lights.....	6.25
10 ton—3 wheel roller—gas	3.50
Tractor trailer units 10-14 yds. with power unit	
and lights	5.00
$2\frac{1}{2}$ yd. Diesel shovel or dragline.....	6.75

There are two reasons why the rates suggested by this Office are somewhat lower than the ones requested by you. First, we have had to adjust your repair costs by removing repairs due to normal wear and tear, since compensation for such repairs is included within the bare rental. Second, this Office has taken the position that supervision is a service which should be charged to the job rather than to the equipment. To the extent, therefore, that the lessee requires such a service, you may bill this separately or have the supervisor placed upon the payroll of the lessee. We might point out further that this Office prefers to have rates established upon a straight time work week basis with the un-

derstanding that any payments for overtime may be billed separately to the extent that such payments are based upon the wages prevailing on March 31, 1942.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 5

KUCKENBERG RENTALS TO A. J. GEORIG CONST. CO. March 10, 1944
Andrew Lee Rapp

Henry A. Kuckenberg, et al.

147

Item of Equipment	Month 1942	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Celling Price (Mar. 1942)	Total Allowable Charge	Total Excessive Charge
#414 Tractor	December	190½	11.00	2095.50	8.60	1638.30	457.20
#408 Tractor	December	54½	11.00	599.50	8.60	468.70	130.80
#411 Tractor	December	229½	11.00	2524.50	8.60	1973.70	550.80
#420 Tractor	December	232	11.00	2552.00	8.60	1995.20	556.80
#417 Tractor	December	225	11.00	2475.00	8.60	1935.00	540.00
#418 Tractor	December	238½	11.00	2623.50	8.60	2051.10	572.40
#416 Tractor	December	174½	11.00	1919.50	8.60	1500.70	418.80
Total Tractor Hours	December	1344½					
61-B Carryalls	December	225	2.60	585.00	2.00	450.00	135.00
57-B Carryall	December	182½	2.60	474.50	2.00	365.00	109.50
62-B Carryall	December	137½	2.60	357.50	2.00	275.00	82.50
66-B Carryall	December	133	2.60	345.80	2.00	266.00	79.80
							3633.60

363 Hours Operators Overtime in December @ 1.02 Per Hour.

Taken from itemizations dated { Jan. 9, 1943 } from Kuckenberg Const. Co. to A. J. Goerig Const. Co.
for month of Dec. 1942 { Jan 8, 1943 }

[Printer's Note]: Adding machine tape figures attached: 3,633.60* 3,851.26 3,423.60 5,803.00
2,111.00 Total 18,822.46*

Plaintiff's Pre-Trial and Trial Exhibit No. 5—(Continued)

KUCKENBERG RENTALS TO A. J. GEORIG CONST CO.						March 10, 1944	
						Andrew Lee Rapp	
Item of Equipment	Month 1943	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Celling Price (Mar. 1942)	Total Allow- able Charge	Total Exces- sive Charge
#414 Tractor	January	166	11.00	1826.00	8.60	1427.60	398.40
#408 Tractor	January	186 $\frac{1}{2}$	11.00	2051.50	8.60	1603.90	447.60
#411 Tractor	January	423 $\frac{1}{4}$	11.00	470.25	8.60	367.65	102.60
#420 Tractor	January	243 $\frac{1}{2}$	11.00	2678.50	8.60	2094.10	584.40
#417 Tractor	January	274 $\frac{1}{2}$	11.00	3019.50	8.60	2419.14	600.36
#418 Tractor	January	282	11.00	3102.00	8.60	2425.20	676.80
#416 Tractor	January	252	11.00	2772.00	8.60	2167.20	604.80
Total Tractor Hours	January	1447 $\frac{1}{4}$					
61-B Carryall	January	145	2.60	377.00	2.00	290.00	87.00
57-B Carryall	January	201 $\frac{1}{2}$	2.60	523.90	2.00	403.00	120.90
62-B Carryall	January	218 $\frac{1}{2}$	2.60	568.10	2.00	437.00	131.10
66-B Carryall	January	14	2.60	36.40	2.00	28.00	8.40
W Carryall	January	111 $\frac{1}{2}$	2.60	289.90	2.00	223.00	66.90
							3851.26

479 $\frac{1}{2}$ hours operators overtime in January @ 1.02 per hour.

Taken from itemization dated Feb. 1, 1943, from Kuckenberg to A. J. Goerig Const. Co. for month of January, 1943.

Plaintiff's Pre-Trial and Trial Exhibit No. 5—(Continued)

KUCKENBERG RENTALS TO A. J. GOERIG CONST Co. March 10, 1944
 Andrew Lee Rapp

Item of Equipment	Month 1943	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Ceiling Price (Mar. 1942)	Total Allowable Charge	Total Excessive Charge
#411 Tractor	February	106	11.00	1166.00	8.60	911.60	254.40
#408 Tractor	February	123	11.00	1353.00	8.60	1057.80	295.20
#417 Tractor	February	100	11.00	1100.00	8.60	860.00	240.00
#418 Tractor	February	208½	11.00	2293.50	8.60	1793.10	500.40
#420 Tractor	February	240	11.00	2640.00	8.60	2064.00	576.00
#61 Tractor	February	235	11.00	2585.00	8.60	2021.00	564.00
#66 Tractor	February	223½	11.00	2458.50	8.60	1922.10	536.40
Total Tractor Hours	February	1236					
#W Carryall	February	177	2.60	460.20	2.00	354.00	106.20
#61-B Carryall	February	152½	2.60	396.50	2.00	305.00	91.50
#57-B Carryall	February	201½	2.60	523.90	2.00	403.00	120.90
#62-B Carryall	February	231	2.60	600.00	2.00	462.00	138.60
							<hr/> 3423.60

355 hours operators overtime in February @ 1.02 per hour.

Taken from itemization dated March 5, 1943, from Kuckenberg Const. Co. to A. J. Goerig Const. Co. for month of February, 1943.

KUCKENBERG RENTALS TO A. J. GOERIG CONST. CO.

March 10, 1944

Andrew Lee Rapp

Item of Equipment	Month 1943	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Celling Price (Mar. 1942)	Total Allow- able Charge	Total Exces- sive Charge
#408 Tractor	March	325½	11.00	3580.50	8.60	2799.30	781.20
# 61 Tractor	March	49	11.00	539.00	8.60	421.40	117.60
#417 Tractor	March	275½	11.00	3030.50	8.60	2369.30	661.20
#418 Tractor	March	389½	11.00	4284.50	8.60	3349.70	934.80
#420 Tractor	March	451½	11.00	4966.50	8.60	3882.90	1083.60
# 66-C Tractor	March	284½	11.00	3129.50	8.60	2446.70	682.80
#411 Tractor	March	294	11.00	3234.00	8.60	2528.40	705.60
Total Tractor Hours	March	2069½					
63-B Carryall	March	215½	2.60	560.90	2.00	431.00	129.30
W Carryall	March	26	2.60	67.60	2.00	52.00	15.60
57 Carryall	March	342½	2.60	890.50	2.00	685.00	205.50
61 Carryall	March	259	2.60	673.40	2.00	518.00	155.40
62-B Carryall	March	311	2.60	808.60	2.00	622.00	186.60
							5659.20
603 Grader	March	369½	8.00	2956.00	7.60	2208.20	143.80
							5803.00

815½ hours operators overtime in March @ \$1.02 per hour.

Taken from itemization dated April 30, 1949, from Kuckenberg Const. Co. to A. J. Goerig Const. Co. for month of March, 1943.

Plaintiff's Pre-Trial and Trial Exhibit No. 5—(Continued)

KUCKENBERG RENTALS TO A. J. GOERIG CONST. CO. March 10, 1944
 Andrew Lee Rapp

Item of Equipment	Month 1943	Hours	Kuckenberg Charge per Hr.	Total Kuckenberg Charge	Ceiling Price (Mar. 1942)	Total Allow- able Charge	Total Exces- sive Charge
#408 Tractor	April	166	11.00	1826.00	8.60	1427.60	398.40
#418 Tractor	April	140	11.00	1540.00	8.60	1204.00	336.00
# 66-C Tractor	April	144½	11.00	1589.50	8.60	1242.70	346.80
#420 Tractor	April	145½	11.00	1600.50	8.60	1251.30	349.20
#417 Tractor	April	150½	11.00	1655.50	8.60	1294.30	361.20
Total Tractor Hours	April	746½					
57-B Carryall	April	70½	2.60	183.30	2.00	141.00	42.30
61-B Carryall	April	118½	2.60	308.10	2.00	237.00	71.10
63-B Carryall	April	111	2.60	288.60	2.00	222.00	66.60
62-B Carryall	April	122	2.60	317.20	2.00	244.00	73.20
							<hr/> 2044.80
#603 Grader	April	165½	8.00	1324.00	7.60	1257.80	66.20
							<hr/> 2111.00

280½ hours operators overtime in April @ 1.02 per hour.

Taken from itemization dated April 30, 1943, from Kuckenberg Const. Co. to A. J. Goerig Const. Co. for month of April, 1943.

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 6

KUCKENBERG RENTALS TO BUCKLER COMPANY, ETC.

Andrew Lee Rapp

3-16-44

Item of Equipment Serial DS-1872	Buckler Req. No.	Kucken- berg No.	Invoice Date	Month of Rental 1943	Hours	Kuckenberg Rate	Total Kucken- berg Charge Less Overtime	Overtime for Operator	Celling Rate Per Hour	Total Al- lowed Rate	Overcharge
K-600 Austin Western Grader 90M	5210	.....	4- 8-43	March	29½	8.00	236.00	2.88	7.60	224.20	11.80
	5210	.....	5- 1-43	April	114	8.00	912.00	32.64	7.60	866.40	45.60
	5210	.....	6-10-43	May	174½	8.00	1396.00	75.36	7.60	1326.20	69.80
	5210	.....	7-23-43	June	160½	8.00	1284.00	46.08	7.60	1219.80	64.20
	.....	.....	8-20-43	July	222½	8.00	1780.00	67.68	7.60	1691.00	80.00
											280.40
Serial DS-2662											
K-601 Austin Western Grader 99M	.....	.....	2- 5-43	January	201½	8.00	1612.00	83.52	7.60	1531.40	80.60
	3287	.....	3- 4-43	February	236	8.00	1888.00	67.20	7.60	1793.60	94.40
	3287	.....	4- 8-43	March	185½	8.00	1409.80	56.64	7.60	1409.80	74.20
	2750	.....	5- 1-43	April	4½	8.00	36.00	4.32	7.60	34.20	1.80
											251.00
Serial 3396											
K-606 Austin Western Grader 99M	4321	1459	3- 4-43	February	220¼	8.00	1762.00	67.20	7.60	1673.80	88.20
	4321	1450	4-20-43	March	27	8.00	216.00	2.88	7.60	205.20	10.80
	4321	1459	4- 8-43	March	196½	8.00	1572.00	57.12	7.60	1493.40	78.60
	2754	111	4- 9-43	March	52¾	8.00	422.00	15.36	7.60	400.90	21.10
	17837	591	4- 9-43	March	7	8.00	56.00	.....	7.60	53.20	2.80
	4321	.....	5- 1-43	April	107	8.00	856.00	34.56	7.60	813.20	42.80
	4321	.....	6-10-43	May	42½	8.00	340.00	10.08	7.60	323.00	17.00
											261.30
Serial 9K4154-SP											
K-603 Caterpillar Motor Grader #12	4789	.....	5- 1-43	April	74	8.00	592.00	17.28	7.60	562.40	29.60
	4789	.....	6-10-43	May	247	8.00	1976.00	83.52	7.60	1877.20	98.80
	4789	.....	7-23-43	June	138	8.00	1104.00	33.60	7.60	1048.80	56.20
											184.60
Serial 9K-4751-SP											
K-604 Caterpillar Motor Grader #12	1750	.....	2- 5-43	January	73½	8.00	588.00	23.04	7.60	558.60	29.40
	16291	.....	2- 5-43	January	23½	8.00	188.00	7.68	7.60	178.60	9.40
	16291	.....	2- 5-43	January	23½	8.00	188.00	7.20	7.60	178.60	9.40
	16291	.....	2- 5-43	January	26	8.00	208.00	.....	7.60	197.60	10.40
	.....	.....	3- 5-43	February	38½	8.00	308.00	7.68	7.60	292.60	15.40
	16291	.....	3- 5-43	February	6	8.00	48.00	.....	7.60	45.60	2.40
	2612	.....	3- 4-43	February	16	8.00	128.00	7.68	7.60	121.60	6.40
	.....	.....	3- 6-43	February	21	8.00	168.00	.48	7.60	159.60	8.40
	2612	.....	3- 6-43	February	53	8.00	424.00	9.12	7.60	402.80	21.20
	17826	.....	4- 9-43	March	8	8.00	64.00	7.68	7.60	60.80	3.20
	17826	.....	4- 9-43	March	17½	8.00	140.00	9.12	7.60	133.00	7.00
	5227	.....	4- 9-43	March	44	8.00	352.00	11.16	7.60	334.40	18.60
	5227	.....	5- 1-43	April	160	8.00	1280.00	52.13	7.60	1216.00	64.00
											205.20

[Printer's Note] : Adding machine tape figures attached: 280.40* 251.00 261.30 184.60 205.20 Total 1,182.50*

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 7

KUCKENBERG RENTALS TO LEASE & LEIGLAND

Andrew Lee Rapp
March 20, 1944

Date of Equipment	Date Invoice	Week Ending	Hours	Kuckenberg Rate	Total Kuckenberg Charge	Ceiling Rate Per Hour	Total Allowed	Overcharge
Austin Western 99M Patrol	12- 8-43	10-20-43	291½	8.00	236.00	7.60	224.20	11.80
Same	12- 8-43	10-27-43	20	8.00	160.00	7.60	152.00	8.00
Same	12- 8-43	11- 3-43	14	8.00	112.00	7.60	106.40	5.60
Same	12- 8-43	11-10-43	10	8.00	80.00	7.60	76.00	4.00
Same	12- 8-43	11-17-43	4½	8.00	36.00	7.60	34.20	1.80
Same	12- 8-43	11-24-43	9	8.00	72.00	7.60	68.40	3.60
Same	12- 8-43	12- 1-43	11	8.00	88.00	7.60	83.60	4.40
Same	12-11-43	12- 8-43	15	8.00	120.00	7.60	114.00	6.00
Same	12-17-43	12-15-43	46	8.00	368.00	7.60	349.60	18.40
Same	12-27-43	12-22-43	31½	8.00	252.00	7.60	239.40	12.60
								76.20

\$1.60 per hour was deducted as operator was furnished by lessee—does not affect the amount of the overcharge.

#415 D-8 Cat Tractor & 2½ C4 Carryall	12- 8-43	10-20-43	12	10.60	139.20	10.60	137.20	12.00
Same	12- 8-43	10-27-43	30	11.60	348.00	10.60	318.00	30.00
								42.00
#415 D-8 Cat Tractor	12- 8-43	10-27-43	2	9.09	18.18	8.60	17.20	.98
Same	12- 8-43	11- 3-43	11	9.09	99.99	8.60	94.60	4.40
								5.38

\$1.60 per hour was deducted as operator was furnished by lessee—does not affect the amount of the overcharge.

#410 D-8 Cat Tractor	12- 8-43	11- 3-43	261½	9.09	240.89	8.60	227.90	12.99
Same	12- 8-43	11-10-43	72½	9.09	657.03	8.60	623.50	33.53
Same	12- 8-43	11-17-43	45½	9.09	413.60	8.60	391.30	22.30
Same	12- 8-43	11-24-43	42	9.09	381.78	8.60	361.20	20.58
Same	12- 8-43	12- 1-43	45½	9.09	413.60	8.60	391.30	22.30
Same	12-11-43	12- 8-43	25	9.09	227.25	8.60	215.00	12.25
Same	12-17-43	12-15-43	59½	9.09	540.86	8.60	511.70	29.16
Same	12-27-43	12-22-43	25½	9.09	231.80	8.60	219.30	12.50
								165.61
#601 Austin Western								289.19
Grader 99M	6-10-43	May	211½	6.40	1353.60	7.60—1.60=6.00	1269.90	84.60
Same	7-23-43	June	260	6.40	1664.00	7.60—1.60=6.00	1560.00	104.00
Same	8-20-43	{ July }	219½	6.40	1404.80	7.60—1.60=6.00	1317.00	87.80
Same	11- 4-43	{ Aug. }	124	8.00	992.00	7.60	942.40	49.60
								326.00

[Printer's Note]: Adding machine tape figures attached: 76.20* 42.00 5.38 165.61 326.00 Total 615.19*

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 8

Address All Mail: Route 7 - Box 949

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, 16, Oregon

Phone WEBster 2259

11104 N. E. Holman St.

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

Date

Ship To

Your Number

Terms: Net Cash

Our Order

COST SUMMARY

A. J. Goerig Construction Co., Bremerton Airport
Rental of Equipment

	Unusual Repairs	Ordinary Mainte- nance & Repairs	Operation	Total Cost of Contract
Total Payrolls for Labor, Bremerton	2,120.14	4,568.24	15,360.28	22,057.66
Total Payrolls for Labor, Portland	5,173.14	19,869.16		25,042.30
Total Repair Part, Bremerton and Portland	25,436.86	8,933.54		34,370.40
Total Gas, Oil, etc.			3,752.90	3,752.90
Total Freight, Hauling Eqpmt.			4,807.48	4,807.48
Total Indust. Ins., Social Sec., etc.	822.49			822.49
Total Miscel. Ex- penses at Brem- erton		379.42		379.42
	<u>33,552.63</u>	<u>33,750.36</u>	<u>23,929.66</u>	<u>90,853.23</u>
O.P.A. Bare Rentals				\$46,810.78

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 9

Address All Mail: Route 7 - Box 949

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, 16, Oregon

Phone WEBster 2259

11104 N. E. Holman St.

Sold To

Date

Ship To

Your Number

Terms: Net Cash

Our Order

PORTLAND PAY ROLL TOTALS

December 12, 1942 to June 19, 1943

Week Ending	Amount	Week Ending	Amount
12/12/42	487.14	4/10/43	1,089.35
12/19/42	1,022.40	4/17/43	1,359.85
12/26/42	877.29	4/24/43	1,728.67
1/ 2/43	549.88	5/ 1/43	1,238.37
1/ 9/43	525.65	5/ 8/43	1,025.02
1/16/43	742.39	5/15/43	963.63
1/23/43	688.47	5/22/43	1,027.13
1/30/43	667.28	5/29/43	1,024.16
2/ 6/43	818.23	6/ 5/43	909.64
2/13/43	636.75	6/12/43	836.84
2/20/43	667.75	6/19/43	831.85
2/27/43	1,012.82		
3/ 6/43	538.31	Total	\$25,042.30
3/13/43	521.15		
3/20/43	701.30		
3/27/43	1,070.73		
4/ 3/43	1,480.25		

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 10

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, Oregon

Phone WEBster 2259 11104 N. E. Holman St.

Date April 30, 1943

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

Ship To Your Number
Terms: Net Cash. Net Our Order

Hauling Charges

Interstate Heavy Hauling	\$1,106.09
Jones Heavy Hauling	292.58
St. Johns Motor Express Co.....	324.36
Kuckenberg Construction Co.	218.77
Kuckenberg Construction Co., (#12 Road Patrol)	139.77
Interstate Heavy Hauling Company,	
Invoice No. 4898	183.13
Invoice No. 4883	92.70
Invoice No. 4897	610.79
Invoice No. 4895	253.58
Jones Hauling Company dated April 12, 1943.....	502.05
Kuckenberg Construction Company	
dated April 13, 1943	943.89
dated April 13, 1943	139.77
	<hr/>
	\$4,807.48

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 11

Address All Mail: Route 7 - Box 949

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, 16, Oregon

Phone WEBster 2259 11104 N. E. Holman St.

Sold To

Date

Ship to

Your Number

Terms: Net Cash

Our Order

SUMMARY OF INVOICES

Date	Description	Misc.	Repairs	Gas, Oil & Grease
Dec.	Union Oil Company.....			395.44
Jan.	“ “ “			794.95
Feb.	“ “ “			687.02
March	“ “ “			1481.90
April	“ “ “			393.59
4/43	Fred M. Viles.....		123.68	
2/43	Woolach Brothers		230.00	
2/43	Air Reducation Sales Co.		17.46	
3/43	“ “ “		6.07	
3/43	“ “ “		12.93	
2/28/43	Expenses	88.51		
4/9/43	“	42.73		
2/9/43	“	12.02		
4/43	“	82.89		
1/43	“	17.52		
3/43	“	18.48		
3/43	“	117.27		
4/30/43	Western Tractor & Equipment Co.		91.48	
3/31/43	“ “		793.87	
2/27/43	“ “		605.99	
1/43	“ “		121.33	
12/42	Pacific Mach & Tool Steel Co.		41.32	
4/43	Tracey & Co. ....		.25	
5/43	Francis Motor Car Co.....		60.23	
4/43	J. E. Haseltine		65.00	
4/23/43	Walling Tractor Co.		181.09	

Summary of Invoices—(Continued)

Date	Description	Misc.	Repairs	Gas, Oil & Grease
3/43	Bearing Sales & Service....		62.52	
3/43	“ “ “		56.12	
4/43	“ “ “		9.61	
4/43	Hofius-Ferris		290.15	
12/42	Kuckenberg Const. Co.....		668.96	
12/26/42	“ “		4382.77	
12/27/42	“ “		1762.38	
1/8/43	“ “		306.20	
1/1/43	“ “		374.93	
1/12/43	“ “		2592.00	
2/43	“ “		256.19	
2/43	“ “		2417.43	
2/43	“ “		638.08	
3/43	“ “		3135.12	
3/43	“ “		1936.75	
3/43	“ “		960.00	
4/43	“ “		543.08	
1/43	Interstate Tractor & Equipment Co.		37.75	
1/43	“ “		109.39	
1/8/43	“ “		19.15	
1/8/43	“ “		540.00	
1/14/43	“ “		205.23	
1/12/43	“ “		890.80	
3/17/43	“ “		790.99	
3/17/43	“ “		883.10	
3/15/43	“ “		5.82	
3/15/43	“ “		26.58	
3/26/43	“ “		1350.00	
3/26/43	“ “		114.18	
3/24/43	“ “		1826.80	
4/1/43	“ “		13.76	
4/6/43	“ “ .....		.39	
4/6/43	“ “		182.80	
4/6/43	“ “ .....		.72	
4/6/43	“ “ .....		.72	
4/6/43	“ “ .....		.32	
4/5/43	“ “		2.22	
4/5/43	“ “		46.70	
4/13/43	“ “		3.12	
4/15/43	“ “		37.78	

Summary of Invoices—(Continued)

Date	Description	Misc.	Repairs	Gas, Oil & Grease
4/14/43	Interstate Tractor Co. Equipment Co.		258.10	
4/12/43	“ “		5.92	
4/15/43	“ “		27.15	
4/15/43	“ “		540.00	
4/21/43	“ “		327.60	
4/30/43	“ “		88.00	
5/3/43	“ “		7.98	
5/3/43	“ “ .....		.48	
5/3/43	“ “		704.00	
5/3/43	“ “		536.14	
5/4/43	“ “		1.12	
5/7/43	“ “		238.12	
5/7/43	“ “		217.90	
5/11/43	“ “		90.63	
5/12/43	“ “		28.29	
5/12/43	“ “		207.04	
5/14/43	“ “		26.49	
5/14/43	“ “		4.68	
5/14/43	“ “		72.28	
5/17/43	“ “		5.34	
5/18/43	“ “		1.32	
5/17/43	“ “		24.72	
5/20/43	“ “		423.07	
5/20/43	“ “		149.96	
5/24/43	“ “		227.08	
5/20/43	“ “		2.70	
5/24/43	“ “		18.92	
5/25/43	“ “		2.05	
5/25/43	“ “		8.10	
6/4/43	“ “		157.14	
6/2/43	“ “ .....		.24	
6/3/43	“ “		3.45	
6/3/43	“ “ .....		.32	
6/3/43	“ “		14.21	
6/3/43	“ “		1.45	
6/3/43	“ “		13.95	
6/3/43	“ “		21.03	
3/3/43	Harvey V. Lombard.....		4.12	
12/14/42	Kuckenberg Const. Co.....		78.00	
		\$379.42	\$34,370.40	\$3,752.90

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT No. 12

Prentiss M. Brown, Price Administrator,
McDannel Brown, Chief Enforcement Attorney,
Office of Price Administration

The undersigned, Henry A. Kuckenberg, hereby advises you that he refuses to answer any questions or to produce any documents or other evidence concerning rental of construction and road maintenance equipment, on the ground that the answers to said questions or the production of such documents or other evidence may tend to incriminate him or subject him to a penalty or forfeiture.

Dated October 19, 1943.

HENRY A. KUCKENBERG

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT No. 13

Chester Bowles, Administrator of the Office of Price
Administration

McDannel Brown, Chief Enforcement Attorney
Office of Price Administration

The undersigned, Harriet A. Kuckenberg, hereby advises you that she refuses to answer any questions or to produce any documents or other evidence concerning rental of construction and road maintenance equipment, on the ground that the answers to said questions or the production of such documents or other evidence may tend to incriminate her or Kuck-

enberg Construction Company, a co-partnership, or subject her or said Kuckenberg Construction Company to a penalty or forfeiture.

Dated January 6, 1944.

HARRIET A. KUCKENBERG

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 14

Chester Bowles, Administrator of the
Office of Price Administration

McDannel Brown, Chief Enforcement Attorney
Office of Price Administration

The undersigned, Henry A. Kuckenberg, hereby advises you that he refuses to answer any questions or to produce any documents or other evidence concerning rental of construction and road maintenance equipment, on the ground that the answers to said questions or the production of such documents or other evidence may tend to incriminate him or Kuckenberg Construction Company, a co-partnership, or subject him or said Kuckenberg Construction Company to a penalty or forfeiture.

Dated January 6, 1944.

HENRY A. KUCKENBERG

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 15

Kuckenberg Construction Co.

General Contractor

11104 Northeast Holman Street

Bus. Phone WE 2259

Portland, Oregon

May 5, 1944

Mr. Walter Shoemaker,

Office of Price Administration

Rm 6225, Federal Office Building #1

Washington, D. C.

Refer to: 694:2:PEA

MPR 134

Dear Sir:

With reference to your letter of February 5, 1943, wherein you state that your office will not object to our using a rate of \$3.50 per hour for Motor Grader Diesel Heavy Duty, and Motor Grader Diesel all wheel drive and steer with attachments, you state that this rate has been arrived at after careful consideration of the cost data submitted, together with information which your office has obtained from many other lessors of similar equipment.

On February 10, 1943, Porter W. Yett of this city submitted identical cost data covering a Patrol Grader Caterpillar 18,550 lb. Diesel powered pneumatic tire, and on February 23, 1943, you allowed a rate of \$4.40 per operating hour.

On March 9, 1943, United Contracting Co. of this city submitted data covering a Western Austin Blade No. 77, and on March 31, 1943, you allowed \$4.40.

It may be that the information that we submitted in our letter of February 5, 1943, did not sufficiently describe the equipment. The equipment described in our letter as Motor Grader Diesel Heavy Duty is in fact a Caterpillar Model 12, approximately 22,700 lb. with heavy duty scarifier and lights. The Caterpillar Patrol Grader described by Porter W. Yett is a Model 11 Caterpillar, which is a smaller machine.

The Motor Grader Diesel all wheel drive and steer with attachments described in our letter of February 5, 1943, is an Austin Western 99M, which is a larger machine than the Austin Western 77 on which you allowed \$4.40 to United Constructing Co.

Under these circumstances and with this additional information we feel that we should be entitled to at least \$4.40 per hour on these two machines and can see no reason why we should be allowed \$3.50 when these other machines are allowed \$4.40, especially upon identical cost data. Both these machines we are writing you about belonging to Porter W. Yett and United Contracting Co. were used on the same jobs our graders were used on, doing the identical work, so we cannot understand why there should be this difference in rates. We would appreciate it if you would grant us at least the same rate of \$4.40 that you granted these other people.

Very truly yours,

KUCKENBERG CONSTRUCTION CO.

HK:jm

HENRY KUCKENBERG
Partner.

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 16

Kuckenberg Construction Co.
General Contractors
11104 Northeast Holman Street

Bus. Phone: WE 2259

Portland, Oregon

May 19, 1944

Mr. Walter Shoemaker
Office of Price Administration
Rm 6225, Federal Office Building #1
Washington, D. C.

Refer to: 694:2:PEA
MPR 134

Dear Sir:

We have not heard from you in answer to our letter to you of May 5, 1944.

We had intended that this letter of May 5, 1944, should be a further report pursuant to the provisions of Section 1399.6 (2) (b), that is to say, a recomputation in accordance with the requirements of Paragraph (2) (b) providing for a price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service, so that final settlement could be made in accordance with your action upon this request.

If this was not made sufficiently clear in the letter of May 5, would you kindly consider this

letter a part of said letter of May 5 and treat the letter of May 5 accordingly?

Yours very truly,

KUCKENBERG CONSTRUCTION CO.

HK:jm

HENRY KUCKENBERG
Partner

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 17

Office of Price Administration
Washington, D. C.

6203 Federal Office Building No. 1

Registered Mail—Return Receipt Requested

May 24, 1944

Kuckenberg Construction Company
11104 Northeast Holman Street
Portland, Oregon

Attention: Mr. Henry Kuckenberg, Partner
In reply refer to: 694:2:BZ

Gentlemen:

This is in reply to your letter of May 15, 1944 in reference to the rates suggested by this Office for your Diesel Motor Graders—\$3.50 per hour for a Diesel Heavy Duty and for a Diesel All Wheel Drive and Steer.

This Office, at one time, did approve for several lessors, an operating service rate of \$4.40 per hour for a Heavy Duty Diesel Grader; however, we now

consider this rate excessive. We are contacting all contractors who have been allowed a similar rate and are suggesting a lower rate which is more in line with the average of operating costs submitted by lessors from various parts of the country. (Porter W. Yett was advised of the lower rate in our letter to him of April 15, 1944).

Accordingly, this Office disapproves the rate of \$4.40 per hour and suggests and will have no objection to the following maximum operating service rates:

Diesel Grader—All Wheel Drive and Steer, \$3.55 per hour

Diesel Grader—Heavy Duty (Caterpillar Model 12), \$3.75 per hour

These rates cover all costs due to operation and maintenance.

In regard to rentals on a fully operated basis, the maximum rates are those suggested in our letter to you of March 25, 1944 (to cover bare rental and operation and maintenance):

Model 99M Austin Western Diesel Motor Grader \$6.45 per hour

Model 12 Caterpillar Diesel Motor Grader \$6.40 per hour

Very truly yours,

WALTER SHOEMAKER

WALTER SHOEMAKER,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 18

Kuckenberg Construction Co.
General Contractors
11104 Northeast Holman Street

Bus. Phone: WE 2259
via Registered Mail

Portland, Oregon
June 1, 1944

Mr. Walter Shoemaker, Head
Construction and Extraction
Equipment Section, Machinery Branch,
Office of Price Administration
6203 Federal Office Bldg., No. 1
Washington, D. C.

Re: 694:2:BZ

Dear Sir:

We are in receipt of your letter of May 24, 1944, which is in reply to our letter of May 15, 1944.

In your letter of May 24, 1944, you admit that you did approve an operating service rate of \$4.40 per hour for a heavy duty Diesel Grader for several lessors and you state that you now consider this rate excessive. However, this does not cover the situation which has resulted by reason of these differences in the allowance granted. Our rate of \$3.50 was granted in a letter dated February 5, 1943 and the other higher rates were granted at approximately the same time.

The lessors who were granted the higher rates were operating their equipment on the identical job we were operating on and were receiving and entitled to receive the sum of \$4.40 per hour for

their similar equipment, whereas we would be entitled to receive only \$3.50 per hour under your allowance on the same job for similar equipment. Your reduction of the rate of these other lessors is not retroactive and does not cancel out their right to charge these rates during the time previous to your cancellation, so that these other lessors still are permitted to charge \$4.40 during the period that we are still restricted to a lower rate.

Section 139916 (2) (b) (1) of MPR 134, Amendment No. 3, provides that the charge shall result in a price bearing a normal relation to the maximum price of a competitive supplier of the same or similar service. We feel that in all fairness to us you should allow us a rate of \$4.40 per hour up to the time that the rate to competitive suppliers was cut down. In view of this provision of the Regulation, why should there be this discrimination against us covering that period of time? Why should we be required to rent at \$3.50 per hour when the other lessors working along side of us on the same job are allowed by you to charge \$4.40 per hour? We cannot see why you should object to permitting us to charge the same price for our equipment during this period regardless of what you are doing now. We feel that any other procedure would be a discrimination against us which we cannot understand, and we feel that it does not conform to the Regulation itself since the Regulation does not contemplate a lower price for one supplier of the same or similar service than another. We feel this all the more keenly since our equipment

on this job was larger equipemnt than the ones you allowed the \$4.40 rate to and performed more work and cost more to operate.

We feel that in all fairness your letter of February 5, 1943, should be amended to provide for a rate of \$4.40 per hour instead of \$3.50 per hour, and that the \$4.40 per hour rate should apply up to the time that you reduced the rates to the other lessors. Would you kindly advise if you would be willing to do this.

Yours very truly,

KUCKENBERG

CONSTRUCTION CO.

By.....

Partner.

Defendant's Pre-Trial Exhibit 19 A

February 10, 1943

Office of Price Administration
Washington, D. C.

Construction & Road Maintenance Equipment Section

Contents:

We wish to file the following rental prices on our Patrol graders, Caterpillar 18,550 Lb., Diesel powered, Pneumatic tired:

240 Hour Basis

\$1.70 per hour for bare equipment, power patrol blade

\$1.86 per hour for labor (operator), insurance, etc.

\$.90 per hour for diesel, oil, grease and other lubricant

\$3.46 per hour for repairs and maintenance, service and supervision

\$8.00 p'r hour Total

Very truly yours,

POST 3 7. YTT

By _____
Attest: _____

Monthly

2.18

$$\begin{array}{r} 240 \overline{) 525} \\ \underline{480} \\ 450 \\ \underline{240} \\ 2100 \\ \underline{1920} \\ 180 \end{array}$$

Kately
 312
 48 | 173.
 144

 290
 288

 2

8142
5.25
4.40
9.65

18
4.40

$$\begin{array}{r} 2.60 \\ 4.40 \\ \hline 8.00 \end{array}$$

$\frac{240}{17} = 14$

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT 19-B

Office of Price Administration
Washington, D. C.
Federal Office Building No. 1
Room 6225

Feb. 23, 1943

In reply refer to: 694:2:RJC

Porter W. Yett
6500 N. E. Ainsworth Street
Portland, Oregon

Attention: Mr. Porter W. Yett

Gentlemen:

Reference is made to your letter, dated February 10, 1943, relative to your submission of a rental price for your Caterpillar, Diesel Patrol Graders, pneumatic tires, weight 18,550 Lbs.

In connection with your total rental price it will be necessary to invoice bare rentals and service charges separately (Section 1399.7 of Maximum Price Regulation 134). The bare rental shall be computed in accordance with the rate listed in Appendix A, and the provisions of Section 1399.2 and 1399.3 of Maximum Price Regulation 134.

This Office must disapprove the rate suggested by you but will not object to charge of \$4.40 per operating hour to cover operator, fuel, lubrication, repairs (except those due to normal wear and tear) insurance, overhead and any other costs directly chargeable to operation and maintenance.

The above rate may be added to the bare rental of the foregoing equipment.

Very truly yours,

WALTER SHOEMAKER

WALTER SHOEMAKER,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT 19-C

Office of Price Administration

Washington, D. C.

Federal Office Building No. 1

Room 6225

Feb. 27, 1943

In reply refer to: 694:2:NEA

MPR 134

The United Contracting Company

311 Stock Exchange Building

Portland, Oregon

Attention: Mr. M. J. Lynch, Secy. and
Treas.

Gentlemen:

We have received your letter of February 16, 1943, in which you report a rental agreement with the Kaiser Company of Vancouver, Washington, which provides for a rental of one Model No. 77

Austin Western motor grader for 100 hours at \$7.60 per hour fully operated.

Maximum Price Regulation No. 134 does not provide for a fully operated contract. Section 1399.7 of this Regulation provides that lessors must bill separately bare rentals and operating and maintenance charges which have been established with this Office. Since you did not have a service rate in effect on March 31, 1942, the Regulation requires that you submit to this Office a detailed statement of the services you are performing and of the cost of each service, basing these costs upon wages and prices prevailing on March 31, 1942.

Your letter does not state whether the motor grader is gasoline or Diesel. Assuming that it is a Diesel, this Office will not object to your charging a rate of \$4.40 per operating to cover the services of operator, fuel, lubrication and repairs other than normal wear and tear. You may use this rate pending a receipt by this Office of additional information concerning the services rendered and their costs.

This rate is based upon a straight time work week, and you may bill separately actual overtime wages to the extent that this practice was followed during March, 1942, and is based upon wages prevailing on that date.

With respect to the bare rental, we must ask you not to exceed the maximum charges as set forth

in Appendix A and calculated in accordance with Sections 1399.2 and 1399.3 of this Regulation.

Very truly yours,

WALTER SHOEMAKER

WALTER SHOEMAKER,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

cc: Kaiser Co., Inc.

Vancouver, Washington

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT 19-D

March 9th—1943.

Office of Price Administration,
Federal Office Building, No. 1—Room 6225,
Mr. Walter Shoemaker, Head Construction and
Extraction Equipment Section
Machinery Branch,
Washington, D. C.

Gentlemen:—

Re File No. 694-2-PEA-MPR 134.

Thank you for your letter of February 27th. Neglected to state in our previous letter that this machine—Western Austin Blade No. 77 is gasoline operated. This machine was rented by Kaiser Company, Shipyard, Vancouver, Washington, and is as much the use of same was less than 240 hrs. per

month and less than 7 days per week, the rental of same will be on the daily basis.

We figure the cost of same as follows:—

Per Day Rate	\$4.875	Per Hour
Operator time	1.60	” ”
Gas-oil-ins. repairs etc.	1.125	” ”

Rental charge\$7.60 per hour

In addition to the above we pay the operator when he works over and above the forty hours and time over the eight hours—\$2.40 per hour. The cost of repairs we do not know until the machine is returned to our shops for repair work. We can figure the exact cost of the gasoline and oils—as well as grease. Prior to the above time we have never rented a blade.

We trust the above will completely answer your letter.

Very truly yours,

UNITED CONTRACTING
COMPANY

By M. J. LYNCH

Secy. Treas.

cc: Kaiser Co. Inc.

Vancouver, Wash.

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 19-E

Office of Price Administration

Washington, D. C.

Federal Office Building No. 1

Room 6225

Mar. 31, 1943

In reply refer to: 694:2:RJC

Rec. Apr. 5, 1943

The United Contracting Company

311 Stock Exchange Building

Portland, Oregon

Attention: M. J. Lynch, Sec. Treas.

Gentlemen:

This will acknowledge receipt of your letter dated March 9, 1943, submitting cost data in connection with your Western Austin Blade No. 77 which you have rented on a fully operated basis.

In view of your statement that this equipment is rented intermittently, and never for a full week at a time, this Office will have no objection to your renting it on an hourly basis, at a fully operated rate of \$7.60 per hour. However as stated in our letter of February 27, 1943, it will be necessary to invoice your bare rental and operating service charges separately (Section 1399.7 of Maximum Price Regulation 134). The bare rental, however billed, must not exceed the daily, weekly or monthly rate, whichever is applicable. This is in accordance with Sections 1399.2 and 1399.3 of Maximum Price Regulation 134.

We also have no objection to an operating service rate of \$4.40 per hour to cover operator, fuel, lubrication, repairs (except those due to normal wear and tear) insurance, overhead and any other costs directly chargeable to operation and maintenance.

In connection with overtime pay which you refer to in the last paragraph of your letter please refer to fourth paragraph of our letter of February 27, 1943.

Very truly yours,

WALTER SHOEMAKER

WALTER SHOEMAKER,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

Copy sent to Kaiser Co. Apr. 5, 1943.

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 20-A AND B

May 11, 1943

Office of Price Administration
Washington, D. C.

Gentlemen:—

I own a tractor with Bulldozer and Gas shovel which I rent on a fully operated basis. I recently learned that Maximum Price Regulation 134 requires me to file a list of my charges with your office to obtain approval thereof. Although I figure my charges, mostly on an hourly basis, I am gen-

erally doing a specific or separate job like I was a contractor. I have been trying to figure out for quite a while, how to comply with your regulations and have finally decided the best way was to set forth in detail the manner in which I do business.

The tractor I own is an Allis-Chalmers 50 HP diesel, Model WKO, equipped with a Baker hydraulic bulldozer. My power shovel is a Bucyrus Erie, Model 10-B, $\frac{3}{8}$ C.Yd with gasoline engine. With the exception of one shovel that was in Hood River, 25 miles from here, this bulldozer and shovel are the only ones available for rental within a radius of at least 50 to 75 miles of The Dalles. The only work I get are the smaller odd jobs for the farmers, small loggers, occasional emergency work for the Union Pacific or other Industrial concerns operating through here. I had some work last year from a big contractor but not much since then. The jobs are all small, with considerable expense moving from one to the other, as most of them only last two or three days and seldom more than ten days.

Although this equipment is rarely busy during the winter months, it has generally been fairly busy during the rest of the year. However, to keep my operators, I have to hire them on a year around basis. They help maintain the equipment, doing the repair work and all the greasing to the best of their mechanical ability. The actual productive hours do not work out so good with my present help but it is the best I can do. Also, my supervisory costs are high, for the reason that either myself or General Foreman of my gravel business

have to look over and help plan out most of the jobs before we get them. My customers usually only know in a general way what they want done and we lay out the job and estimate how long it will take. We can not figure on a yardage basis, because they do not know or have it figured out that way. One of us must stay around the job a good part of the day to see that the work is being carried out as originally discussed. Many of the jobs are in out of the way places, away from telephones or good roads, so that we have to keep checking up, to give any assistance or see what might be needed. Since everything is temporary, we have to take fuel and supplies out daily.

I only rent the bull dozer and shovel on a fully operated basis. I was charging a straight \$7.00 per hour in March of 1942. I have never made a separate charge for operating and another for the equipment alone. In fact, I have delayed writing this letter for a month or so, trying to figure them out separately but without much success. All I can do is estimate that \$5.00 an hour is a reasonable charge for the operator, fuel, oil, greasing, oiling, repairs, insurance, taxes, supervision and miscellaneous overhead. The operating costs run higher when the job is very far from The Dalles, as we have to pay the Operators mileage for their cars as well as extra time going to and from the job, also their meals and other extra expenses.

If I made one charge for this equipment and another charge for all the operation, maintenance and supervision detail, then most of the time on all

these short jobs the charge would be a great deal higher than \$7.00 an hour. Then I never would get through explaining to my customers how much the charges might be or how I had finally charged afterwards. I only charge for the actual time the machines are operating and many of the customers watch the time plenty close.

I will appreciate it if you will let me continue to operate my equipment the way I have been, for \$7.00 per hour.

Very truly yours

MID-COLUMBIA SAND
& GRAVEL

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT No. 20-C AND D

[Marginal Note in pencil]: Public Roads
Admin. F. S. Metzger, Pur. Agent. Telephone Port-
land At 6171. Room 327.

Office of Price Administration

Washington, D. C.

Federal Office Building No. 1

Room 6225

In reply refer to: 694:2RJC

May 27, 1943

Mid-City Columbia Sand & Gravel

The Dalles

Oregon

Attention Mr. Wm. N. Dielschneider

Gentlemen:

Reference is made to your letter dated May 11,

1943, submitting for approval your dully operated charges for certain equipment.

Although your rental prices were in effect March 31, 1942, they were on a fully operated basis, combining rental and maintenance plus the hourly charge for operating labor. Section 1399.6 of Maximum Price Regulation 134 states' . . . "If on March 31, 1942, however, a lessor leased construction or road maintenance equipment on a 'fully operated' or similar basis and also on a 'bare' basis, the established charge in effect on March 31, 1942 for the operating or maintenance services provided in the contract for such equipment on the 'fully operated' or similar basis, when supplied in connection with the rental of such equipment, shall be the difference between the 'rental' price in effect on March 31, 1942, of such equipment on the 'Fully operated' or similar basis and on the 'bare' basis." Inasmuch as you were not renting on a 'bare basis' on March 31, 1942, the foregoing Section of Maximum Price Regulation 134 cannot be applied.

(1 * * * omitted because)

*This Office cannot approve the rates as submitted, but will have no objection to the following operating service rates per operating hour for the equipment listed:

Item	Hourly Operating Rate
Model WKO-Allis-Chalmers tractor with bulldozer	\$3.25
3/8 yd. gasoline shovel (model 10-B-Bucyrus-Erie)..	4.50

The foregoing rates cover operator, oiler (where required), fuel, lubrication, repairs (except those

due to normal wear and tear), insurance, overhead and any other costs directly chargeable to operation and maintenance. These rates are based on straight time; charges for any actual overtime wages for operating personnel may be added, such charges to be computed on the basis of overtime wage rates in effect March 31, 1942. To the operating service rates listed above you may add the applicable bare rental rates in accordance with Maximum Price Regulation 134.

With respect to supervision, this Office has taken the position that such service should not be charged to the equipment, but rather may be separately billed, if the lessee requires the services of a supervisor in connection with the work performed by the equipment.

In connection with the costs of car mileage, meals, and running time (to and from jobs) of your operators, such charges should be invoiced separately and be a matter of mutual agreement between lessor and lessee.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,

Head Construction and Ex-
traction Equipment Sec-
tion Machinery Branch.

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT No. 20-E
L.1931

1137 Nichols Blvd.
Longview, Washington

April 16, 1943

Office of Price Administration
Washington, D. C.

Gentlemen:

Attached is a list of the rental rates charged on my six pieces of equipment, all being used on War Construction Projects.

These prices are based on my furnishing the equipment, operator or operators, oil, grease, maintenance, transportation, etc.

Under the heading (5) as listed on the "Break-down on Monthly Charges", I have included the following: Two mechanic's salaries; two pick-up trucks and one truck with machinery trailer, all furnished by me. The equipment listed is rented as mentioned with everything furnished. The two mechanics run, service and keep these units supplied with fuel, grease, etc., in addition to keeping them in good repair. It is necessary that I furnish each of these men with a pick-up truck. The large machinery truck and trailer is also maintained at my expense. It is extremely essential that all of this expense be divided somewhat proportionately to each unit in order for me to show any profit upon my equipment and for my work.

The prices which I am charging for rental on my equipment were in effect on and before March

1942; in fact, these rates have been charged for the past four years on my equipment.

In one or two instances I have rented a unit or two without furnishing any of the services just mentioned, and on such jobs I have charged the rental rates in accordance with the O.P.A. maximum rental rates.

Hoping that these rates will meet with your approval in every respect, and with an outlook to a favorable reply from you, I remain

Yours very truly,

RALPH R. GAY

RRG:EC

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-F

RENTAL RATES:

T-20 International 26 H.P. Gas Tractor and

Angle Dozer	\$ 4.50 per hr.
8 hrs. per day @ \$4.50 per hr.....	36.00 per day
6 days per week @ 36.00 per day.....	216.00 per week
4 weeks per month @ \$216.00 per week.....	864.00 per month

BREAKDOWN ON MONTHLY CHARGES:

1. T-20 and equipment—O.P.A. Rental Allowance.....	\$305.00
2. Operation furnished by owner @ \$1.60 per hr. straight time—time and one half overtime.....	332.80
3. Gasoline fuel per month	80.00
4. Oil and Grease	18.00
5. Maintenance, Transportation, Taxes and Insurance....	128.20
	<hr/>
	864.00
	<hr/>

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-G

RENTAL RATES:

T-6 International 30 H.P. Gas Tractor, straight		
dozer and hoist	\$	5.00 per hr.
8 hrs. per day @ \$5.00 per hr.....		40.00 per day
6 days per week @ \$40.00 per day.....		240.00 per week
4 weeks per month @ \$240.00 per week.....		960.00 per month

BREAKDOWN ON MONTHLY CHARGES:

1. T-6 and equipment—O.P.A. Rental Allowance.....	\$358.00
2. Operator furnished by owner @ \$1.60 per hr. straight time—time and one half overtime.....	332.80
3. Gasoline fuel per month	85.00
4. Oil and Grease	18.00
5. Maintenance, Transportation, Taxes and Insurance....	166.20
	960.00

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-H

RENTAL RATES:

TD-9 International 39 H.P. Diesel Tractor, Angle		
Dozer and Hoist	\$	6.00 per hr.
8 hrs. per day @ \$6.00 per hr.....		48.00 per day
6 days per week @ \$48.00 per day.....		288.00 per week
4 weeks per month @ \$288.00 per week.....		1152.00 per month

BREAKDOWN ON MONTHLY CHARGES

1. TD-9 and equipment—O.P.A. Rental Allowance.....	\$ 510.00
2. Operator furnished by owner @ \$1.60 per hr. straight time—time and one half overtime.....	332.80
3. Diesel fuel oil per month.....	48.00
4. Oil and Grease	20.00
5. Maintenance, Transportation, Taxes and Insurance	241.20
	\$1152.00

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-I

RENTAL RATES:

TD-14 International 54 H.P. Diesel Tractor,

Angle Dozer and Hoist	\$ 7.00 per hr.
8 hrs. per day @ \$7.00 per hr.....	56.00 per day
6 days per week @ \$56.00 per day.....	336.00 per week
4 weeks per month @ \$336.00 per week.....	<u>1344.00 per month</u>

BREAKDOWN ON MONTHLY CHARGE:

1. TD-14 and equipment—O.P.A. Rental Allowance....	\$ 700.00
2. Operator furnished by owner @ \$1.60 per hr. straight time—time and one half overtime.....	332.80
3. Diesel fuel oil per month	55.00
4. Oil and Grease	25.00
5. Maintenance, Transportation, Taxes and Insurance..	231.20
	<u><u>\$1344.00</u></u>

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-J

RENTAL RATES:

LS-40 Link-Belt Speeder Gas $\frac{3}{8}$ cu. yd.

Shovel	\$ 7.00 per hr.
8 hrs. per day @ \$7.00 per hr.....	56.00 per day
6 days per week @ \$56.00 per day.....	336.00 per week
4 weeks per month @ \$336.00 per week.....	<u>1344.00 per month</u>

BREAKDOWN ON MONTHLY CHARGE:

1. LS-40 Link-Belt Speeder Shovel—O.P.A. Rental Allowance	\$ 440.00
2. Operator furnished by owner @ \$1.65 per hr. straight time and time and one half overtime.....	343.36
Oil furnished by owner @ \$1.10 per hr. straight time and time and one half overtime.....	228.80
3. Gasoline fuel per month	85.00
4. Oil and Grease per month	20.00
5. Maintenance, Transportation, Taxes & Insurance....	226.84
	<u><u>\$1344.00</u></u>

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-K

RENTAL RATES:

B-5 Speeder Diesel $\frac{3}{4}$ cu. yd. Shovel.....	\$ 9.00 per hr.
8 hrs. per day @ \$9.00 per hr.....	72.00 per day
6 days per week @ \$72.00 per day.....	432.00 per week
4 weeks per month @ \$432.00 per week.....	1728.00 per month

BREAKDOWN ON MONTHLY CHARGE:

	per mo.
1. B-5 Speeder Shovel—O.P.A. Rental Allowance.....	\$ 715.00
2. Operator furnished by owner @ \$1.65 per hr.	
straight time—time and one half overtime.....	343.36
Oiler furnished by owner @ \$1.10 per hr.	
straight time—time and one half overtime.....	228.80
3. Diesel fuel oil per month.....	60.00
4. Oil and Grease	27.00
5. Maintenance, Transportation, Taxes and Insurance	353.84
	<hr/>
	\$1728.00

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 20-L

Office of Price Administration

Washington, D. C.

Federal Office Building No. 1

Room 6225

In reply refer to: 694:2:RJC

May 7, 1943

Mr. Ralph R. Gay

1137 Nichols Boulevard

Longview, Washington

Dear Mr. Gay:

Reference is made to your letter and attached

schedule dated April 16, 1943, submitting for approval your rental rates for certain equipment.

Although your rental prices were in effect March 31, 1942, they were on a fully operated basis, combining rental and maintenance plus the hourly charge for operating labor. Section 1399.6 of Maximum price Regulation 134 states . . . " If on March 31, 1942, however, a lessor leased construction for road maintenance equipment on a 'fully operated' or similar basis and also on a 'bare' basis, the established charge in effect on March 31, 1942 for the operating or maintenance services provided in the contract for such equipment on the 'fully operated' or similar basis, when supplied in connection with the rental of such equipment, shall be the difference between the 'rental' price in effect on March 31, 1942, of such equipment on the 'fully operated' or similar basis and on the 'bare' basis." Inasmuch as you were not renting on a 'bare' basis on March 31, 1942, the foregoing Section of Maximum Price Regulation 134 cannot be applied.

This Office cannot approve the rates as submitted but will have no objection to the following operating rates per operating hour for the equipment listed:

Item	Hourly operating rate
T-20 International tractor with angledozer.....	\$ 2.35
T-6 International tractor with bulldozer and hoist....	2.50
TD-9 International tractor with angledozer and hoist	2.675
TD-14 International tractor with angledozer and hoist	2.60
LS-40 Link belt Speeder crane with $\frac{3}{8}$ yd. bucket....	3.76
B-5 Speeder with $\frac{3}{4}$ yd. bucket	4.20

The foregoing rates cover operator, oiler (where required), fuel, lubrication, repairs (except those due to normal wear and tear), insurance, overhead and any other costs directly chargeable to operation and maintenance. These rates are based on straight time; charges for any actual overtime wages for operating personnel may be added, such charges to be computed on the basis of overtime wage rates in effect March 31, 1942. To the operating service rates listed above you may add the applicable bare rental rates in accordance with Maximum Price Regulation 134.

In connection with your fully operated rates, it will be necessary to invoice your bare rental and operating service charges separately (Section 1399.7 of Maximum Price Regulation 134). The bare rental, however billed, must not exceed that computed on the daily, weekly or monthly rate, whichever is applicable. This is in accordance with Sections 1399.2 and 1399.3 of Maximum Price Regulation 134.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,

Head Construction and Ex-
traction Equipment Sec-
tion Machinery Branch

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT No. 20-N and O

Office of Price Administration
Washington, D. C.
Federal Office Building No. 1
Room 6225

Recd. Aug. 24/43
Aug. 18, 1943

Mr. J. A. Lyons
3305 Northeast Halsey Street
Portland, Oregon

In reply refer to:694:2:RJC

Dear Mr. Lyons:

Reference is made to your letter dated August 10, 1943, submititng for approval your schedule of charges covering full maintenance and operation of certain equipment.

This Office cannot approve the rates submitted but will have no objection to the following operating service rates per operating hour for the equipment listed:

Item	Hourly operating rate
89-135 diesel tractor with power control unit and light	\$4.30
89-135 diesel tractor with bulldozer and lights.....	4.50
89-135 diesel tractor with heavy rooter	4.40
41-46 diesel tractor (with bulldozer) and lights.....	2.95
41-46 diesel tractor with double drum Hyster logging winch	3.05
41-46 diesel tractor with bulldozer and lights.....	3.10
89-135 diesel tractor with 10-13½ yd. scraper	
89-135 diesel tractor with 13½-15 yd. scraper.....	4.90
Gasoline motor grader single drive, heavy duty.....	4.20

The foregoing rates cover operator, fuel, lubrication, repairs (except those due to normal wear and tear), insurance, overhead and any other costs directly chargeable to operation and maintenance. These rates are based on straight time; charges for any actual overtime wages for operating personnel may be added, such charges to be computed on the basis of overtime wage rates in effect March 31, 1942. To the operating service charges you may add the applicable bare rental charges computed in accordance with Maximum Price Regulation 134.

Item	Hourly operating rate
$\frac{3}{4}$ cu. yd. gas dragline with lights	\$5.10
$\frac{3}{4}$ cu. yd. gas shovel with lights.....	5.70
$1\frac{1}{4}$ cu. yd. gas dragline with lights.....	6.40
$1\frac{1}{4}$ cu. yd. gas shovel with lights.....	6.40

The foregoing rates cover operator, oiler, fuel, lubrication, repairs (except those due to normal wear and tear), insurance, overhead and any other costs directly chargeable to operation and maintenance. These rates are based on straight time; charges for any actual overtime wages for operating personnel may be added, such charges to be computed on the basis of overtime wage rates in effect March 31, 1942. To the operating service charges you may add the applicable bare rental charges computed in accordance with Maximum Price Regulation 134.

It will be necessary to invoice your bare rental and operating service charges separately (Section 1399.6 of Maximum Price Regulation 134 Amendment No. 9). The bare rental, however billed, must

not exceed that computed on the daily, weekly or monthly rate, whichever is applicable. This is in accordance with Sections 1399.2 and 1399.3 of this Regulation.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,
Head Construction and Ex-
traction Equipment Sec-
tion Machinery Branch

Rec'd 8/24/43

DEFENDANT'S PRE-TRIAL AND TRIAL
EXHIBIT No. 20-P

J. A. Lyons

General Contractor

3305 Northeast Halsey Street

Telephone TRinity 2841

Portland, Oregon
September 24, 1943.

Mr. Walter Shoemaker,
Office of Price Administration,
Federal Office Building No. 1
Room 6225,
Washington D. C.

Refer: 694:2:RJC.

Dear Sir:

Reference is made to your letter of August 18, 1943 containing hourly operating rates for various pieces of equipment.

It is my understanding that these rates are the

maximum amounts that may be charged after July 1, 1943.

During 1942 and until July 1, 1943, much of this equipment was rented on a fully operated basis at a flat fee per hour. For example, a D8 95 h.p. Caterpillar tractor with power control unit and bulldozer was rented at \$8.50 per hour; similarly a D8 tractor with a 16 yd. Carryall Scraper was rented at \$10.00 per hour. These rates represented no increase over the March 1942 rates and were the established rates in this area at that time. However, we had no established charge for operating and maintenance service until my application was made in August of this year.

Now the question arises—Must the rates as listed in your letter of August 18 apply retroactively to rental contracts Before July 1, 1943 and most particularly to rentals before October 22, 1942??

The question arose a few days ago when the Kaiser Co., Vancouver asked for our operating charges for work done in July and August 1942.

Very truly yours,

J. A. LYONS

By

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT No. 20-Q

Office of Price Administration
Washington, D. C. (25)
6225 Federal Office Building No. 1
Oct. 1, 1943

Mr. J. A. Lyons
3305 Northeast Halsey Street
Portland, Oregon

In reply refer to: 694:2:SS

Dear Mr. Lyons:

This will acknowledge your letter of September 24, 1943, in regard to your operating and maintenance charges.

We note your statement that during 1942 and until July 1, 1943, you rented equipment on a fully operated basis at a flat fee per hour. After May 11, 1942 Maximum Price Regulation No. 134 required that road maintenance and construction equipment bare rental charges for the equipment listed therein must be listed separately on invoices from operating and maintenance service charges. It was not until Maximum Price Regulation No. 134, Including Amendment No. 9, was issued on July 1, 1943, that provision was made for invoicing fully operated equipment rental at a flat hourly fee. Therefore, you were in violation of the Regulation when you rented equipment on a fully operated basis between May 11, 1942 and July 1, 1943. Further, you may not rent your equipment on a fully operated basis after July 1, 1943 without first

filing with, and obtaining the approval of, this Office for your proposed rates. (See Section 1399.6 of Maximum Price Regulation No. 134, Including Amendment No. 9).

In reply to your question in your fourth paragraph, we wish to advise you that the rates listed in our letter of August 18, 1943 apply retroactively to rental contracts entered into on and after October 22, 1942. The operating and maintenance service rates you may use prior to October 22, 1942 are those you charged, or would have charged, during March 1942, in accordance with the provisions of the General Maximum Price Regulation which governed such charges until they were incorporated into Maximum Price Regulation No. 134.

Should you have any further questions in regard to this matter, do not hesitate to write us again.

Very truly yours,

WALTER SHOEMAKER

Walter Shoemaker,

Head Construction and Ex-
traction Equipment Section
Machinery Branch

Recd. Oct. 7-43.

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 21

KUCKENBERG CONSTRUCTION CO.

General Contractors
Portland, Oregon

Phone WEBster 2259 11104 N. E. Holman St.

Date March 9, 1944

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

OPA Billing for Dec. 1942 to Apr. 1943

Ship To
Terms: Net Cash

Your Number
Our Order

SUMMARY OF EQUIPMENT POSSESSION BY LESSEE

For OPA Regulation #134 Rental Basis

	Possession Starts	Possession Ends
#408 Tractor & Dozer	Dec. 8, 1942	April 15, 1943
#411 Tractor & Dozer	Dec. 8, 1942	March 21, 1943
#414 or #61 Tractor & Dozer	Dec. 8, 1942	March 5, 1943
#416 or #66C Tractor & Dozer	Dec. 4, 1942	April 15, 1943
#417 Tractor & Dozer	Dec. 3, 1942	April 15, 1943
#418 Tractor & Dozer	Dec. 3, 1942	April 15, 1943
#420 Tractor & Dozer	Dec. 2, 1942	April 15, 1943
#57B Carryall—Gar Wood	Dec. 3, 1942	April 9, 1943
#61B Carryall—Le Tourneau	Dec. 3, 1942	April 15, 1943
#62B Carryall—Le Tourneau	Dec. 3, 1942	April 15, 1943
#63B—66B or W Carryall— Le Tourneau	Dec. 8, 1942	April 15, 1943
#603 Road Patrol Grader Rooter or Ripper—Woolridge,	Feb. 2, 1943	April 15, 1943
Extra Heavy Duty	Dec. 26, 1942	April 13, 1943
Light Plant—Kohler, Gasoline	Dec. 7, 1942	April 28, 1943

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Co. Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company,
Lloyd Building, Seattle, Washington

OPA BILLING MPR 134

SPECIFICATIONS OF EQUIPMENT

For Kitsap County Airport, Bremerton, Washington
December 1942 to April 1943OPA Monthly Rental Rates—Maximum Price Regulation,
As Amended, October 22, 1942

Tractors #408 and #418 w/Angledozer	OPA—Reg. 134
Crawler, Diesel—89 to 130 DBHP.....	\$ 775.00 per month
4 Drum Power Unit	160.00 per month
Angledozer	175.00 per month
Generator—Lights	15.00 per month

Total—OPA Bare Equipment Rental....\$1,125.00 per month

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of
\$1,125 or \$2.3437 per hr.OPA Approved Operating & Maintenance Service Rate
(2/5/43) \$4.40 per hour.

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Possession (#408—Dec. 8, 1942 to April 15, 1943
(#418—Dec. 3, 1942 to April 15, 1943)

Tractors #408 and #418 w/Scraper (Carryall)

Tractors, As Above	\$1,125.00 per month
Scraper (Carryall) w/o Power Unit.....	790.00 per month

Total—OPA Bare Equipment Rental....\$1,915.00 per month

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of
\$1,915 or \$3.989 per hr.OPA Approved Operating & Maintenance Service Rate
(2/5/43) \$4.90 per hour.

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Specifications of Equipment—(Continued)

Tractor #411 and #414 (or 61-C) w/Bulldozers OPA—Reg. 134	
Crawler, Diesel, 89 to 130 DBHP.....	\$ 775.00 per month
4 Drum Power Unit	160.00 per month
Bulldozer	145.00 per month
Generator—Lights	15.00 per month
#414 or 61-C—	
Total OPA Bare Equipment Rental....\$1,095.00 per month	

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of \$1,095 or \$2.28 per hr.

OPA Approved Operating & Maintenance Service Rate (2/5/43) \$4.40 per hour.

*(Tractor #411 equipped with Land Clearing Blade or Bulldozer.)

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Possession (#411—Dec. 8, 1942 to March 21, 1943
(#414 or 61-C—Dec. 8, 1942 to March 5, 1943

Tractors #416 (or 66-C), #417 &

#420 w/Pushdozer	OPA—Reg. 134
Crawler, Diesel—89 to 130 DBHP.....	\$ 775.00 per month
4 Drum Power Unit	160.00 per month
Rigid Pushdozer	25.00 per month
Generator—Lights	15.00 per month

Total—OPA Bare Equipment Rental....\$ 975.00 per month

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of \$975 or \$2.03 per hr.

OPA Approved Operating & Maintenance Service Rate (2/5/43) \$4.30 per hour.

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Possession (#416 or 66-C—Dec. 4, 1942 to April 15, 1943
(#417—Dec. 3, 1942 to April 15, 1943
(#420—Dec. 2, 1942 to April 15, 1943

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Specifications of Equipment—(Continued)

Tractors #416 (or 66-C), #417 & #420

w/Scraper (Carryalls)

Tractors #416, #417, #420, As Above.....\$ 975.00 per month

Scraper (Carryall) w/o Power Unit

16 to 20½ Cu. Yd. Struck..... 790.00 per month

Total—OPA Bare Equipment Rental....\$1,765.00 per month

Houring Rate in Excess of 240 hrs. per mo. @ 1/480 of \$1,765
or \$3.677 per hr.

OPA Approved Operating & Maintenance Service Rate
(2/5/43) \$4.90 per hour.

Special Contract—Excessive Wear & Tear @ \$2.00 per hour.

Motor Patrol Order #603

OPA—Reg. 134

Grader, Self Propelled, Diesel, Pneumatic

Tired, Extra Heavy Duty\$525.00 per month

Scarifier, Heavy 35.00 per month

Generator, Lights 15.00 per month

Total—OPA Bare Equipment Rental....\$575.00 per month

Hourly Rate in Excess of 240 hours per mo. @ 1/480 of \$575
or \$1.1979 per hr.

OPA Approved Operating & Maintenance Service Rate
(2/5/43) \$3.50 per hour.

Possession—Feb. 2, 1943 to April 15, 1943.

Light Plant

2000 Watt, Gasoline, Kohler #4160\$60.00 per month

Possession—Dec. 7, 1942 to Feb. 28, 1943.

Rooter

Woolridge Extra Heavy Rooter

Serial #3107, Weight - 15,000 lbs.....\$175.00 per month

Possession—Dec. 26, 1942 to April 13, 1943.

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company,
Lloyd Building, Seattle, Washington

OPA BILLING FOR DECEMBER 1942

Ship To	Your Number
Terms: Net Cash	Our Order

Rental of Tractors & Equipment Bremerton, Washington—For
December 1942—Re-invoiced in accordance with OPA Maxi-
mum Price Regulation No. 134, 10/22/42

Tractor #414 (or 61-C) w/Bulldozer

OPA Bare Rental Rate (fractional month) 12/8 to	
12/31—24 days—24/30 of \$1,095.....	\$ 876.00
190½ Hrs. OPA Approved Operating & Maintenance	
Rate @ \$4.40	838.20
190½ Hrs. Contract for Repairs & Breakage in Ex-	
cess of Ordinary Wear & Tear @ \$2.00.....	381.00
61 Hrs. Actual Overtime for Operators @ \$1.02.....	62.22

Tractor #408 w/Angledozer

OPA Bare Rental Rate (fractional month) 12/8 to	
12/31—24 days—24/30 of \$1,125	900.00
54½ Hrs. OPA Approved O & M rate @ \$4.40.....	239.80
54½ Hrs. Contract—Excess Repairs @ \$2.00.....	109.00
2 Hrs. Actual Overtime for Operators @ \$1.02.....	2.04

Tractor #411 w/Bulldozer

OPA Bare Rental Rate (fractional month) 12/8 to	
12/31—24 days—24/30 of \$1,095	876.00
229½ Hrs. OPA Approved O & M rate @ \$4.40.....	1,009.80
229½ Hrs. Contract—Excess Repairs @ \$2.00.....	459.00
68 Hrs. Actual Overtime for Operators @ \$1.02.....	69.36

Tractor #420 w/Pusher & Carryall Scraper

OPA Bare Rental Rate (fractional month) 12/3 to	
12/31—29 days—29/30 of \$1,765	1,691.66
232 Hrs. OPA Approved O & M rate @ \$4.90.....	1,136.80
232 Hrs. Contract—Excess Repairs @ \$2.00.....	464.00
54½ Hrs. Actual Overtime for Operators @ \$1.02....	55.59

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, December 1942, Re-invoiced
in accordance with OPA—(Continued)

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental Rate (fractional month) 12/3 to 12/31—29 days—29/30 of \$1,765	\$1,691.66
225 Hrs. OPA Approved O & M rate @ \$4.90.....	1,102.50
225 Hrs. Contract—Excess Repairs @ \$2.00.....	450.00
60½ Hrs. Actual Overtime for Operators @ \$1.02....	61.71

Tractor #418 w/Angledozer & Carryall Scraper

OPA Bare Rental Rate (fractional month) 12/3 to 12/31—29 days—29/30 of \$1,915	\$1,851.16
193 Hrs. O & M rate for Cat & Angledozer @ \$4.40	849.20
45½ Hrs. O & M rate for Cat & Scraper @ \$4.90....	222.95
238½ Hrs. Contract—Excess Repairs @ \$2.00.....	477.00
62 Hrs. Actual Overtime for Operators @ \$1.02.....	63.24

Tractor #416 w/Pusher & Carryall Scraper

OPA Bare Rental Rate (fractional month) 12/4 to 12/31—28 days—28/30 of \$1,765	1,633.32
174½ Hrs. OPA Approved O & M rate @ \$4.90.....	855.05
174½ Hrs. Contract—Excess Repairs @ \$2.00.....	349.00
55 Hrs. Actual Overtime for Operators @ \$1.02.....	56.10

Rooter, Woolridge—Extra Heavy Duty

OPA Bare Rental Rate (fractional month) Dec. 26, 1942 to Jan. 25, 1943	175.00
---	--------

Cartage:

Western Heavy Hauling Co.	1,106.09
Jones Hauling Company	292.58
St. Johns Heavy Hauling Co.	324.36
Kuckenberg Construction Co.	218.77

December 1942—Total OPA Maximum.....\$20,960.16

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

OPA BILLING FOR JANUARY 1943

Rental of Tractors & Equipment, Bremerton, Washington—For
January 1943—Re-invoiced in accordance with OPA Maxi-
mum Price Regulation No. 134, 10/22/42

Tractor #414 (or 61-C) w/Bulldozer

OPA Bare Rental Rate—January	\$1,095.00
166 Hrs. OPA Approved Operating & Maintenance Service Rate @ \$4.40	730.40
166 Hrs. Contract for Repairs & Breakage in Excess of Ordinary Wear & Tear @ \$2.00.....	332.00
55½ Hrs. Actual Overtime for Operators @ \$1.02....	56.61

Tractor #408 w/Bulldozer

OPA Bare Rental Rate—January	1,125.00
186½ Hrs. OPA Approved O & M rate @ \$4.40.....	820.60
186½ Hrs. Contract—Excess Repairs @ \$2.00.....	373.00
6 Hrs. Actual Overtime for Operators @ \$1.02.....	69.36

Tractor #411 w/Bulldozer

OPA Rate Rental Rate—January	1,095.00
42¾ Hrs. OPA Approved O & M Rate @ \$4.40.....	188.10
42¾ Hrs. Contract—Excess Repairs @ \$2.00.....	85.50
3 Hrs. Actual Overtime for Operators @ \$1.02.....	3.06

Tractor #420 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—January	1,765.00
3½ Hrs. Equipment Rental in Excess of 240 Hrs. @ 1/480 of \$1,765—\$3.677 x 3½ hrs.....	12.87
149½ Hrs. O & M rate for Cat & Carryall @ \$4.90....	732.55
94 Hrs. O & M rate for Cat & Dozer @ \$4.40.....	413.60
243½ Hrs. Contract—Excess Repairs @ \$2.00.....	487.00
85½ Hrs. Actual Overtime for Operators @ \$1.02....	87.21

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, January 1943, Re-invoiced
in accordance with OPA—(Continued)

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—January	\$1,765.00
34½ Hrs. Equipment Rental in Excess of 240 hrs. @	
1/480 of \$1,765—\$3.677 x 34½ hrs.....	126.86
264 Hrs. O & M rate for Cat & Carryall @ \$4.90.....	1,293.60
10½ Hrs. O & M rate for Cat & Dozer @ \$4.40.....	46.20
274½ Hrs. Contract—Excess Repairs @ \$2.00.....	549.00
82 Hrs. Actual Overtime for Operators @ \$1.02.....	83.64

Tractor #418 w/Angledozer & Carryall Scraper

OPA Bare Rental Rate—January	1,915.00
42 Hrs. Equipment Rental in Excess of 240 Hrs. @	
Cat & Dozer Rate only—1/480 of \$1,125—	
\$2.3437 x 42	98.44
242 Hrs. O & M Rate for Cat & Dozer @ \$4.40.....	1,064.80
40 Hrs. O & M Rate for Cat & Carryall @ \$4.90....	196.00
282 Hrs. Contract—Excess Repairs @ \$2.00.....	564.00
108½ Hrs. Actual Overtime for Operators @ \$1.02....	110.67

Tractor #416 (or 66-C) w/Pusher & Carryall Scraper

OPA Bare Rental Rate—January	1,765.00
12 Hrs. Equipment Rental in Excess of 240 Hrs. @	
Cat & Dozer rate only—1/480 of \$975 or	
\$2.03 x 12 hrs.	24.36
237 Hrs. O & M rate for Cat & Carryall @ \$4.90.....	1,161.30
15 Hrs. O & M rate for Cat & Dozer @ \$4.40.....	66.00
252 Hrs. Contract—Excess Repairs @ \$2.00.....	504.00
77 Hrs. Actual Overtime for Operators @ \$1.02.....	78.54

Rooter, Woolridge—Extra Heavy

OPA Bare Rental Rate—Jan. 26 to Feb. 25.....	175.00
--	--------

Light Plant—Kohler #4160—Gasoline

OPA Bare Rental Dec. 7, 1942 to Feb. 6, 1943 @ \$60	120.00
---	--------

Cartage on Caterpillar #12 Road Patrol	139.77
--	--------

Additional Time Billed Feb. 10, 1943 for Showup Time	89.89
--	-------

January 1943—Total OPA Maximum.....\$21,408.93

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Co. Statement Heading]

March 9, 1944

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

OPA BILLING FOR FEBRUARY 1943

Rental of Tractors & Equipment, Bremerton, Washington—For
February 1943—Re-invoiced in accordance with OPA Maxi-
mum Price Regulation No. 134, 10/22/42

Tractor #411 w/Bulldozer

OPA Bare Rental Rate—February	\$1,095.00
106 Hrs. OPA Approved Operating & Maintenance Service Rate @ \$4.40	466.40
106 Hrs. Contract for Repairs & Breakage in Excess of Ordinary Wear & Tear @ \$2.00.....	212.00
27 Hrs. Actual Overtime for Operators @ \$1.02.....	27.54

Tractor # 408 w/Angledozer

OPA Bare Rental Rate—February	1,125.00
123 Hrs. OPA Approved O & M rate @ \$4.40.....	541.20
123 Hrs. Contract—Excess Repairs @ \$2.00.....	246.00
25½ Hrs. Actual Overtime for Operators @ \$1.02....	26.01

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—February	1,765.00
89½ Hrs. O & M rate for Cat. & Carryall @ \$4.90....	438.55
10½ Hrs. O & M rate for Cat. & Dozer @ \$4.40.....	46.20
100 Hrs. Contract—Excess Repairs @ \$2.00.....	200.00
23½ Hrs. Actual Overtime for Operators @ \$1.02....	23.97

Tractor #418 w/Angledozer & Carryall Scraper

OPA Bare Rental Rate—February	1,915.00
201½ Hrs. O & M rate for Cat & Carryall @ \$4.00....	987.35
7 Hrs. O & M rate for Cat & Dozer @ \$4.40.....	30.80
208½ Hrs. Contract—Excess Repairs @ \$2.00.....	417.00
69½ Hrs. Actual Overtime for Operators @ \$1.02....	70.89

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, February 1943, Re-invoiced
in accordance with OPA—(Continued)

Tractor #420 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—February	\$1,765.00
237½ Hrs. O & M rate for Cat & Carryall @ \$4.90....	1,163.75
2½ Hrs. O & M rate for Cat & Dozer @ \$4.40.....	11.00
240 Hrs. Contract—Excess Repairs @ \$2.00	480.00
74 Hrs. Actual Overtime for Operators @ \$1.02.....	75.48

Tractor #414 (or 61-C) w/Bulldozer

OPA Bare Rental Rate—February	1,095.00
8 Hrs. Equipment Rental in Excess of 240 Hrs. @ 1/480 of \$1,095—\$2.20 x 8 hrs.....	18.24
*248 Hrs. OPA Approved O & M rate @ \$4.40.....	1,091.20
*248 Hrs. Contract—Excess Repairs @ \$2.00.....	496.00
67½ Hrs. Actual Overtime for Operators @ \$1.02....	68.85

*(Was billed at 234 hrs. Have added 13 hrs. to Tractor #414 or 61-C incorrectly posted to Carryall 61-B. Time sheets are correct.)

Tractor #416 (or 66-C) w/Pusher & Carryall Scraper

OPA Bare Rental Rate—February	1,765.00
220½ Hrs. O & M rate for Cat & Carryall @ \$4.90....	1,080.45
3 Hrs. O & M rate for Cat & Dozer @ \$4.40.....	13.20
223½ Hrs. Contract—Excess Repairs @ \$2.00.....	447.00
68 Hrs. Actual Overtime for Operators @ \$1.02.....	69.36

Rooter, Woolridge—Extra Heavy Duty

OPA Bare Rental rate—Feb. 26 to March 25.....	175.00
Additional invoice (3/6/43) for labor and superintendent as per contract	450.00

Motor Patrol Grader #603

OPA Bare Rental Rate (fractional month) Feb. 2 to 28—27 days—27/30 of \$575	517.48
101½ Hrs. OPA Approved O & M rate @ \$3.50.....	355.25
23½ Hrs. Actual Overtime for Operators @ \$1.02....	23.97

February 1943—Total OPA Maximum.....\$20,795.14

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Co. Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company
Lloyd Building, Seattle, Washington

OPA BILLING FOR MARCH 1943

Rental of Tractors & Equipment, Bremerton, Washington—For
March 1943—Re-invoiced in accordance with OPA Maxi-
mum Price Regulation No. 134, 10/22/42

Tractor #408 w/Angledozer

OPA Bare Rental Rate—March	\$1,125.00
85½ Hrs. Equipment Rental in Excess of 240 Hrs. @ 1/480 of \$1,125—\$2.3437 x 85½ hrs.....	200.39
325½ Hrs. OPA Approved Operating & Maintenance Service Rate @ \$4.40.....	1,432.20
325½ Hrs. Contract for Repairs & Breakage in Excess of Ordinary Wear & Tear at \$2.00.....	651.00
133½ Hrs. Actual Overtime for Operator @ \$1.02....	136.17

Tractor #414 (or 61-C) w/Bulldozer

OPA Bare Rental Rate (fractional month) March 1 to 5—5/30 of \$1,095	182.50
49 Hrs. OPA Approved O & M rate @ \$4.40.....	215.60
49 Hrs. Contract—Excess Repairs @ \$2.00.....	98.00
9 Hrs. Actual Overtime for Operator @ \$1.02.....	9.18

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental Rate—March	1,765.00
35½ Hrs. Equipment Rental in Excess of 240 hrs. @ 1/480 of \$1,765—\$3.677 x 35½ hrs.....	130.53
275½ Hrs. OPA Approved O & M rate @ \$4.90.....	1,349.95
275½ Hrs. Contract—Excess Repairs @ \$2.00.....	551.00
107½ Hrs. Actual Overtime for Operators @ \$1.02....	109.65

Tractor #418 w/Angledozer & Carryall Scraper

OPA Bare Rental Rate—March	1,915.00
149½ Hrs. Equipment Rental in Excess of 240 hrs. @ Cat & Dozer rate 1/480 of \$1,125—\$2.3437 x 149½ hrs.	350.38
194 Hrs. O & M rate for Cat & Carryall @ \$4.90.....	950.60
195½ Hrs. O & M rate for Cat & Dozer at \$4.40.....	860.20
389½ Hrs. Contract—Excess Repairs @ \$2.00.....	779.00
157 Hrs. Actual Overtime for Operator @ \$1.02.....	160.14

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, March 1943, Re-invoiced
in accordance with OPA—(Continued)

Tractor #420 w/Pusher & Carryall Scraper	
OPA Bare Rental Rate—March	\$1,765.00
211½ Hrs. Equipment Rental in Excess of 240 hrs.	
@ 1/480 of \$1,765—\$3.677 x 211½ hrs.....	777.69
451½ Hrs. OPA Approved O & M rate @ \$4.90.....	2,212.35
451½ Hrs. Contract—Excess Repairs @ \$2.00.....	903.00
189 Hrs. Actual Overtime for Operator @ \$1.02.....	192.78
Tractor #416 (or 66-C) w/Pusher & Carryall Scraper	
OPA Bare Rental Rate—March	1,765.00
44½ Hrs. Equipment Rental in Excess of 240 hrs @	
Cat & Dozer rate 1/400 of \$1,765—\$3.677x44½ hrs.	163.63
233 Hrs. O & M rate for Cat & Carryall @ \$4.90.....	1,141.70
51½ Hrs. O & M rate for Cat & Dozer @ \$4.40.....	226.60
284½ Hrs. Contract—Excess Repairs @ \$2.00.....	569.00
108½ Hrs. Actual Overtime for Operators @ \$1.02....	110.67
Tractor #411 w/Bulldozer	
OPA Bare Rental Rate—March	1,095.00
54 Hrs. Equipment Rental in Excess of 240 hrs. @	
1/480 of \$1,095—\$2.28 x 54 hrs.....	123.12
294 Hrs. OPA Approved O & M rate @ \$4.40.....	1,293.60
294 Hrs. Contract—Excess Repairs @ \$2.00.....	588.00
111 Hrs. Actual Overtime for Operator @ \$1.02.....	113.22
Motor Patrol Grader #603	
OPA Bare Rental Rate—March	575.00
129½ Hrs. Equipment Rental in Excess of 240 hrs.	
@ 1/480 of \$575—\$1.1979 x 129½ hrs.....	155.13
369½ Hrs. OPA Approved O & M rate @ \$3.50.....	1,293.25
117½ Hrs. Actual Overtime for Operator @ \$1.02....	119.85
Miscellaneous Items	
10 Hrs. Starting Time for Operator @ \$1.70.....	17.00
1 Hr. Operators Time as per Invoice.....	1.70
9 Hrs. Welding Time @ \$6.00	54.00
7½ Hrs. Operator on Ripper—Regular Time @ \$1.70	12.75
7½ Hrs. Operator on Ribber—Overtime @ \$1.02.....	7.65
20 Hrs. Showup Time @ \$1.70	34.00
<hr/>	
March 1943—Total OPA Maximum.....	\$28,282.18

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

[Kuckenberg Construction Co. Statement Heading]

Date March 9, 1944

Sold To A. J. Goerig Construction Company,
Lloyd Building, Seattle, Washington

OPA BILLING FOR APRIL 1943

Rental of Tractors & Equipment, Bremerton, Washington—
For April 1943—Re-invoiced in accordance with OPA
Maximum Price Regulation No. 134, 10/22/42.

Tractor #408 w/Angledozer

OPA Bare Rental Rate (fractional month) April 1
to 15

214½ Hrs. @ 1/240 of \$1,125—4.687 per hr x 214½ hrs.	\$1,005.36
---	------------

214½ Hrs. OPA Approved Operating & Maintenance Service Rate @ \$4.40	943.80
---	--------

214½ Hrs. Contract for Repairs & Breakage in Ex- cess of Ordinary Wear & Tear @ \$2.00.....	429.00
--	--------

91 Hrs. Actual Overtime for Operators @ \$1.02.....	92.82
---	-------

(Includes Correction Invoice of July 28, 1943)

Tractor #418 w/Angledozer

OPA Bare Rental (fractional month) April 1 to 15

140 Hrs. @ 1/240 of \$1,125—4.687 per hr x 140 hrs.	656.18
---	--------

140 Hrs. OPA Approved O & M rate @ \$4.40.....	616.00
--	--------

140 Hrs. Contract—Excess Repairs @ \$2.00.....	280.00
--	--------

44½ Hrs. Actual Overtime for Operators @ \$1.02....	45.39
---	-------

Tractor #416 (or 66-C) w/Pusher & Carryall Scraper

OPA Bare Rental (fractional month) April 1 to 15

144½ Hrs. @ 1/240 of \$1,765—7.354 x 144½.....	1,062.65
--	----------

126 Hrs. O & M Rate for Cat & Carryall @ \$4.90....	617.40
---	--------

18½ Hrs. O & M Rate for Cat & Dozer @ \$4.40.....	81.40
---	-------

144½ Hrs. Contract—Excess Repairs @ \$2.00.....	289.00
---	--------

55 Hrs. Actual Overtime for Operator @ \$1.02.....	56.10
--	-------

Tractor #420 w/Pusher & Carryall Scraper

OPA Bare Rental (fractional month) April 1 to 15

145½ Hrs. @ 1/240 of \$1,765—7.354 x 145½.....	1,070.01
--	----------

145½ Hrs. OPA Approved O & M rate @ \$4.90.....	712.95
---	--------

145½ Hrs. Contract—Excess Repairs @ \$2.00.....	291.00
---	--------

51 Hrs. Actual Overtime for Operator @ \$1.02.....	52.02
--	-------

Defendant's Pre-Trial and Trial Exhibit
No. 21—(Continued)

Rental of Tractors & Equipment, April 1943, Re-invoiced
in accordance with OPA—(Continued)

Tractor #417 w/Pusher & Carryall Scraper

OPA Bare Rental (fractional month) April 1 to 15

150½ Hrs. @ 1/240 of \$1,765—7.354x150½.....\$1,106.78

150½ Hrs. OPA Approved O & M rate @ \$4.90..... 737.45

150½ Hrs. Contract—Excess Repairs @ \$2.00..... 301.00

56 Hrs. Actual Overtime for Operator @ \$1.02..... 57.12

Motor Patrol Grader #603

OPA Bare Rental (fractional month) April 1 to 15

165½ Hrs. @ 1/240 of \$575.00—2.396 x 166½..... 396.54

165½ Hrs. OPA Approved O & M rate @ \$3.50..... 579.25

68½ Hrs. Actual Overtime for Operator @ \$1.02.... 69.87

Rooter—Woolridge—Extra Heavy Duty

March 26 to April 13—19/30 of \$175..... 110.96

Showup Time for Operators—6 hrs. @ \$1.70..... 10.20

April 1943—Total OPA Maximum.....\$11,670.25

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 23

HOURLY RATE ANALYSIS—BARE RENTAL

Kuckenberg-Goerig Rental

1942-1943

FROM OPA MAXIMUM BILLING

Bare Rental—Houring Rate Variation

	OPA Bare Rental	Hrs. Worked	Would Be An Hourly Rate Of
#408 Tractor w/Angledozer			
December	\$ 900.00	54½	\$16.51
January	1,125.00	186½	6.03
February	1,125.00	123	9.15
March	1,325.39	325½	4.07
April	1,005.36	214½	4.69
#411 Tractor w/Bulldozer			
December	876.00	229½	3.82
January	1,095.00	42¾	25.61
February	1,095.00	106	9.33
March	1,218.12	294	4.14
April	-----	---	-----
#414 Tractor w/Bulldozer			
December	876.00	190½	4.60
January	1,095.00	166	6.60
February	1,113.24	248	4.49
March	182.50	49	3.72
April	-----	---	-----
#416 Tractor w/Carryall			
December	1,633.32	174½	9.36
January	1,789.36	252	7.10
February	1,765.00	223½	7.89
March	1,928.63	284½	6.78
April	1,062.65	144½	7.35
#417 Tractor w/Carryall			
December	1,691.66	225	7.52
January	1,891.86	274½	6.89
February	1,765.00	100	17.65
March	1,895.53	275½	6.88
April	1,106.78	150½	7.35

Hourly Rate Analysis—Bare Rental—(Continued)

	OPA Bare Rental	Hrs. Worked	Would Be An Hourly Rate Of
#418 Tractor w/Carryall			
December	1,851.16	238½	7.76
January	2,013.44	282	7.14
February	1,915.00	208½	9.18
March	2,265.38	389½	5.82
April	656.18	140	4.69
#420 Tractor w/Carryall			
December	1,691.66	232	7.29
January	1,777.87	243½	7.30
February	1,765.00	240	7.35
March	2,542.69	451½	5.63
April	1,070.01	145½	7.35
#603 Motor Patrol Grader			
December	-----	----	-----
January	-----	----	-----
February	517.48	101½	5.10
March	730.13	369½	1.98
April	396.54	165½	2.39

DEFENDANTS' PRE-TRIAL AND TRIAL EXHIBIT NO. 24

Kuckenberg Construction Co.

General Contractors

11104 Northeast Holman Street

Bus. Phone: WE 2259

Portland, Oregon

November 30, 1942.

A. J. Goerig Construction Company,

Lloyd Building,

Seattle, Washington.

Gentlemen:

We herewith propose to furnish you on a rental

basis Tractors, Carryalls and Tournapulls to be used on Contract which you have with the U. S. Engineers for construction an Airport located in Kitsap County, near Bremerton, Washington, for a minimum period of sixty days from this date, at which time if the equipment is required by us on our work we have the right to recall same.

The equipment is to work at least two eight hour shifts, however we are to be allowed a half hour during each eight hour shift for adjustments, maintenance or minor repairs on each piece of equipment, this time not deductible from hourly rental. You are to take delivery of equipment in Portland and return same to us at our Warehouse at Portland, Oregon at your expense.

Price per hour, as follows:

Tractor & Carryall fully maintained & Operated, 11.60 per hour.

Super C Tournapulls fully maintained & Operated, 11.60 per hour.

Pusher Tractor fully maintained & Operated, 9.00 per hour.

Payment: We are to be paid in full the tenth of the following month for each previous months rental. Time to be based on signed operators reports. A certified check in the amount of \$30,000.00 will be deposited and held in escrow for our account, until we receive our final payment, in the First National Bank, Portland, Oregon.

These rates are based on eight hour day or forty hours per week, operation, overtime Saturday and

Sunday work you are to pay the additional overtime wages for personel on the project.

Kindly sign one copy of acceptance and return for our files.

Very truly yours,

KUCKENBERG CONSTRUCTION COMPANY

HENRY KUCKENBERG

Henry Kuckenberg

Partner

A. J. GOERIG CONSTRUCTION CO.

By A. J. GOERIG

Accepted A. J. Goerig

Const. Co.

G. W. WALCH

Accepted:

G. W. WALCH

Portland, Oregon

December 4, 1942

It Is Agreed between Kuckenberg Construction Co. and A. J. Goerig Construction Co. that the contract on the reverse side of this document is hereby amended and altered to this extent: That signed operators' reports are to be approved each day by A. J. Goerig Construction Co. or the representatives of said A. J. Goerig Construction Co.

It Is Further Agreed that at such time as Kuckenberg Construction Co. has received payment in full of all money due under the terms of said contract and said equipment has been returned to the

warehouse of said Kuckenberg Construction Co. at Portland, Oregon as provided in said contract and all terms and conditions to be performed by said A. J. Goerig under the provisions of said contract have been performed then said Kuckenberg Construction Co. agrees to instruct the First National Bank of Portland, Oregon, Main Branch, to return to A. J. Goerig Construction Co. the certified check for \$30,000.00 deposited with said First National Bank of Portland to secure faithful performance by said A. J. Goerig Construction Co. of its part of the terms of said contract.

KUCKENBERG CONSTRUCTION CO.

By HENRY KUCKENBERG

Partner

A. J. GOERIG CONSTRUCTION CO.

By CLYDE PHELP

Partner

DEFENDANTS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 25

Kuckenberg Construction Co.
General Contractors
11104 Northeast Holman Street

Bus. Phone: TRinity 0407

Portland, Oregon
January 9, 1943.

A. J. Goerig Construction Company,
Lloyd Building,
Seattle, Washington.

Gentlemen:

It is agreed between the Kuckenberg Construction Company and A. J. Goerig Construction Company that this agreement is to be made a part of the original contract date November 30th, 1942 covering rental of equipment on a contract located in Kitsap County near Bremerton, Washington.

That due to soil conditions and operating conditions it has been found that the material encountered is such that ordinary wear and tear of the equipment is far greater then normally would be encountered in this type of work, and that repairs are running greatly in excess, inasmuch as these existing conditions were not properly represented to us by Employees handling your contract at the time of entering into this contract, we feel that we are entitled to compensation for repairs and break-ages in excess of normal wear and tear.

We have found that the Tractos will require new rail, bottom rollers, sprockets and front idlers from about five hundred hours operation, normally they

run between three thousand and five thousand hours. So you can readily see that the wear is far greater than normally expected.

As per conversation this date between A. J. Goerig, Clyde Phelps and Messrs. Henry A and L. W. Kuckenberg the following was agreed upon. That due to above extra expense, A. J. Goerig Const. Co., are to pay us an extra \$2.00 per hour for Tractor rental covered by signed operators reports. These rates to apply during the entirety of the contract dated November 30, 1942.

Also we are to furnish a Foreman who has full charge of the operating and repair of our equipment, at a salary not to exceed \$90.00 per week. You are to reimburse us for one half the expense of this employee.

Very truly yours,

KUCKENBERG CONSTRUCTION COMPANY

HENRY KUCKENBERG

Henry Kuckenberg

Partner

A. J. GOERIG

CONSTRUCTION COMPANY.

By A. J. GOERIG

Accepted

A. J. GOERIG CONST. COM.

DEFENDANT'S PRE-TRIAL AND TRIAL EXHIBIT No. 26

KUCKENBERG CONSTRUCTION CO.

General Contractors

11104 Northeast Holman Street

Bus. Phone WE 2259

Portland, Oregon

Bremerton Airport—Kitsap County

A. J. Goerig Contract

RECAP—REPAIRS BREMERTON TRACTORS (Due to unusual breakage, wear and tear, working under extremely hazardous conditions).

Tractor No.	Parts	Bremerton Labor	Portland Labor
414	\$ 2370.46	\$ 250.12	\$ 428.75
416	2179.15	169.90	339.15
417	2638.33	264.56	189.45
420	2408.00	141.66	201.50
408	3404.48	284.12	433.35
411	2810.73	191.58	387.60
418	2308.30	191.66	247.34
Sub Total	\$18119.45	\$1493.60	\$2227.14
Carryall No.			
63B	\$ 986.42	\$ 105.75	\$ 630.00
61B	2877.86	143.68	720.00
57B	1665.79	281.54	860.00
62B	1787.34	95.57	736.00
Sub Total	\$7317.41	\$ 626.54	\$2946.00
Plus:			
Insurance (Soc. Sec. Ind. Ins., etc.)		233.22	589.27
Total	\$25436.86	\$2353.36	\$5762.41
Combined Total.....\$33,552.63			

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

[Kuckenberg Construction Co. Statement Heading]

Bremerton Airport—Kitsap County

A. J. Goerig Contract

Unusual breakage, wear and tear, Tractor #61 (#414)

Date	Description	Bremerton Labor	Parts	Portland Labor
1/8-14/43	Final Drive out (down until 1/14	109.00	215.03	
1/10/43	Replace Tracks—12 Roll- ers — 1 Sprocket — 1 Idler	38.00	540.00	200.35
	Shop Crew went to Bremerton		181.20	
			163.80	
			85.70	
			67.40	
1/18/43	Replace Drawbar	6.12	51.35	
3/3/43	Replace Final Drive Housing	97.00	215.03	
3/15/43	Rails—6 Rollers—1 Sprocket.....		540.00	221.50
	(Portland Shop)		120.80	
			54.60	
			85.70	
3/15/43	Replace Drawbar (Miss- ing on arrival at Port- land)		49.85	6.85
		<hr/>	<hr/>	<hr/>
		\$250.12	\$2370.46	\$428.75

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Tractor #416 (66C)

Date	Description	Bremerton Labor	Parts	Portland Labor
1/27-29/43	New Rails—6 Rollers—2 Sprockets	62.00	540.00 81.90 90.60 171.40	97.72
3/4/43	New Drawbar	13.70	49.85	
3/10-12/43	Replace Tracks & 12 Rollers & 2 Idlers.....	94.20	540.00 163.80 181.20 134.80	78.43
4/26/43	2 Sprockets—4 Top Rollers		171.40	
	(Portland Shop)		54.20	163.00
		\$169.90	\$2179.15	\$339.15

Unusual breakage, wear and tear, Tractor #417

Date	Description	Bremerton Labor	Parts	Portland Labor
1/3/43	Tracks—6 Rollers	84.00	864.00 81.90 90.60	
2/15/43	Broken Drawbar	10.20	51.35	
2/20/43	Bellows Seal Out	43.26	9.80	
2/25/43	Final Drive Out (shop crew at Bremerton)....	14.30	215.03	83.16
3/10-12/43	New Rails & 14 Rollers & 2 Sprockets & 2 Idlers	101.50	540.00 181.20 163.80 27.10 171.40 134.80	97.09
3/11/43	Broken Drawbar	11.30	49.85	
4/24/43	2 Rollers—(Portland Shop)		30.20 27.30	9.20
		\$264.56	\$2638.33	\$189.45

**Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)**

Unusual breakage, wear and tear, Tractor #420

Date	Description	Bremerton Labor	Parts	Portland Labor
1/17/43	Broken Drawbar	5.10	51.35	
1/24/43	Renew Rails & 10 Roll- ers—1 Idler	87.00	540.00	80.00
			120.80	
			109.20	
			27.10	
			67.40	
3/7/43	Broken Drawbar	6.12	51.35	
3/18/43	Replace 2 Rollers.....	17.14	60.40	
3/30/43	4 Rollers	26.30	60.40	
			54.60	
4/22/43	New Tracks—8 Rollers —25 Sprockets (Port- land Shop)		864.00	121.50
			109.20	
			171.40	
		\$141.66	\$2408.00	\$201.50

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Tractor #408

Date	Description	Bremerton Labor	Parts	Portland Labor
			109.20	
1/2/43	Replace Rails & 6	102.00	864.00	
	Rollers	64.26	60.40	
2/15/43	Replace 1 Roller.....	4.08	30.20	
3/26/43	Broken Drawbar	9.00	49.85	
2/21/43	Final Drive Out		215.03	
	New Tracks & 14 Roll- ers — 2 Sprockets — 2		540.00	
	Idlers (Shop crew at Bremerton)	91.52	181.20	212.95
			163.80	
			27.10	
			171.40	
			134.80	
4/6/43	Replace Broken Roll- ers (2)	13.26	60.40	
4/20/43	Rails—10 Rollers (Portland Shop)		540.00	220.40
			120.80	
			109.20	
			27.10	
		<u>\$284.12</u>	<u>\$3404.48</u>	<u>\$433.35</u>

Defendant's Pre-Trial and Trial Exhibit

No. 26—(Continued)

Unusual breakage, wear and tear, Tractor #411 (#55)

Date	Description	Bremerton Labor	Parts	Portland Labor
12/24/42	New Drawbar	11.00	49.85	
1/2/43	Replace Drawbar (time & 1/2).....	20.00	51.35	
1/12/43	Reweld Dozer Blade.....	4.08		
2/2-3/43	Repair Final Drive— 6 Rollers	87.50	215.30	97.50
2/24/43	Replace Rails & 10 Rollers		108.80	
2/24/43	Replace Rails & 10 Rollers	69.00	540.00	112.50
			151.00	
			109.20	
			27.10	
4/18/43	Tracks—2 Sprockets— 16 Rollers		864.00	177.60
			181.20	
			163.80	
			54.20	
			171.40	
		\$191.66	\$2308.30	\$247.34

Unusual breakage, wear and tear, Tractor & Drozer, Tractor #418

Date	Description	Bremerton Labor	Parts	Portland Labor
1/24-25/43	New Tracks & 8 Rollers —2 Sprockets		540.00	
			120.80	
		90.00	109.20	72.34
			171.40	
2/23/43	Broken Drawbar	18.36	49.85	
3/17/43	Broken Drawbar	7.00	51.35	
4/22/43	Rails — 12 Rollers — 1 Sprocket—2 Idlers (Portland Shop)	96.30	864.00	175.00
			181.20	
			85.70	
			134.80	
		\$101.66	\$2308.30	\$247.34

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, (63B) "W" Seraper
form Spokane

Date	Description	Labor	Parts
1/2/43	Replace Bit	\$ 18.72	\$ 59.80
1/14/43	Broke Lead Block	14.00	
1/10/43	Repair	10.20	
2/2-3/43	Repair Tongue & Apron—		
	50#s iron at 0.08c.....	25.50	4.00
2/24/43	Broken Line .....	.85	
2/26/43	Change Unit Cone	5.00	7.54
3/6/43	Change Unit Cones	11.48	15.08
3/14/43	Broken Line	1.70	
3/15/43	Broken Line	5.10	
3/23/43	Broken Line & Tongue		
	—100#s iron at 0.08c.....	6.40	8.00
4/9/43	Broken Sheaves	6.80	
		\$105.75	
	6000 ft.—1/2" Line Consumed during job.....		649.80
	250 ft.—3/4" Line Consumed during job.....		53.25
	Repair required to bring scraper up to same condition as when shipped to Bremerton:		
	50 hrs. welding at 3.00	150.00	
	500#s plate and Parts		129.15
	240 hrs. shop time at 2.00	480.00	
	Bit and Bolts		59.80
		\$735.75	\$986.42

Unusual breakage, wear and tear, Scraper #61B

Date	Description	Labor	Parts
12/30/42	Broken Line	\$ 3.00	
1/4/43	Repair Unit	2.55	
1/8/43	Repair Unit	5.00	
1/9/43	Flat Tire	9.00	525.00
1/12/43	Rock in Tire .....	.85	

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Scraper #61B—(Contd.)

Date	Description	Labor	Parts
1/13/43	Tail Gate Line	3.40	
	Flat Tire	12.00	160.00
1/15/43	Change Tire	12.55	525.00
	Repair (Weld Scraper)	3.40	
1/16/43	Broken Line	1.70	
	Broken Line .....	.85	
1/17/43	Broken Line	1.70	
1/25/43	Broken Line	5.10	
1/26/43	Repairs	13.60	
1/27/43	Repair (Gooseneck 50#s iron at .08c.....)	5.10	4.00
2/9/43	Welding Scraper	2.50	
2/20/43	Repair	5.10	
2/22/43	Broken Bit	11.00	60.04
2/27/43	Change Scraper	2.55	
3/4/43	Change Bit	7.00	60.04
	Flat Tire	12.00	525.00
3/6/43	Unit Repair	5.10	
3/9/43	Change Scraper	2.55	
3/20/43	Change Scraper	6.28	
4/4/43	Change Scraper	3.40	
4/7/43	Broken Line .....	.85	
4/8/43	Welding Bit	4.70	
4/9/43	Replace Wedge .....	.85	
		143.68	
	7000 ft.—1/2" cable consumed during job.....		758.10
	300 ft.—3/4" cable consumed during job.....		63.90
	Repair required to bring scraper up to same condition when shipped to Bremerton:		
	70 hrs. welding at 3.00.....	210.00	
	Parts		196.78
	255 hrs. shop time at 2.00.....	510.00	
		<hr/> \$863.68	<hr/> \$2877.86

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Scraper #57B

Date	Description	Labor	Parts
12/26/42	Arch Assembly (Built in Portland Shop)	\$117.00	\$ 41.32
1/4/43	Broken Line	2.55	
1/8/43	Broken Line	2.55	
1/10-11/43	Broken Tongue (70#s iron at .08c	9.00	5.60
1/14/43	Broken Cable .....	.85	
1/14/43	Broken Cable	2.55	
1/15/43	Repair	1.70	
1/16/43	Broken Line	5.00	
	Broken Tongue (150#s iron at .08c	30.00	12.00
1/18/43	Repair	2.55	
2/9/43	Welding	15.46	
2/16/43	Broken Line	2.55	
2/17/43	Adjust Unit	1.70	
2/19/43	Repair Unit	5.95	
	Replace Tongue Block	7.40	21.00
2/22/43	Cable	1.70	
2/24/43	Cable	3.40	
2/26/43	Cable	3.40	
2/26/43	Cable	2.55	
3/3/43	Cable .....	.85	
3/5/43	Cable	1.70	
3/7/43	Tire Repair	6.70	525.00
3/10/43	Cable .....	.85	
3/11/43	Unit Repair	1.70	
3/12/43	Welding Scraper (40# iron at 08c)	6.23	3.20
3/14/43	Welding Scraper & broken line...	4.25	
3/15/43	Broken Bit	3.40	61.84
3/16/43	Weld Side Cutters	16.00	
3/18/43	Broken Line	3.40	
3/20/43	Welding Bit	6.70	
3/23/43	Broken Line	2.55	
4/5/43	Repair Line—New Cones .....	.85	15.08

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Scraper #57-B—(Contd.)

Date	Description	Labor	Parts
4/7/43	Cable	3.40	
	Broken Bit	5.10	61.84
		<hr/>	
		\$281.54	
7000 ft. Cable Consumed during job at \$10.83			758.10
Repair required to bring scraper up to same condition as when shipped to Bremerton:			
120 hrs. welding at 3.00.....		360.00	
700#s plate & Parts			140.81
250 hrs. shop time at 2.00.....		500.00	
		<hr/>	<hr/>
		\$1141.54	\$1665.79

Unusual breakage, wear and tear, Scraper 62B

Date	Description	Labor	Parts
12/30/42	Repair	\$ 3.00	
1/6/43	Repair Unit .....	.85	
1/11/43	Broken Line	1.70	
1/12/43	Broken Line	2.55	
	Broken Sheave Guides	1.70	
1/13/43	Broken Cable	10.00	
1/15/43	Broken Cable	3.40	
1/16/43	Broken Cable	1.70	
1/18/43	Repair—Cracked Tongue (iron)..	11.50	4.00
1/19/43	Broken Cable	1.70	
1/27/43	Broken Cable	3.83	
2/9/43	Weld Scraper	5.00	
2/18/43	Broken Cable .....	.85	
1/26/43	Repair Scraper	11.90	
2/24/43	Broken Bit	2.55	59.60
	Broken Cable	1.70	
2/27/43	Power Unit Repair (relined cone)	3.82	7.54
2/28/43	Broken Line	1.27	
	Unit Repair	2.55	
3/2/43	Broken Line .....	.85	
3/3/43	Broken Line .....	.85	

Defendant's Pre-Trial and Trial Exhibit
No. 26—(Continued)

Unusual breakage, wear and tear, Scraper 63B—(Contd.)

Date	Description	Labor	Parts
3/4/43	Change Bit	7.00	59.60
3/12/43	Flat Tire	10.85	475.00
4/5/43	Change Scraper	3.40	
4/7/43	Broken Apron Line	3.40	
4/10/43	Change Bit	7.00	59.60
4/8/43	Change Scraper	2.55	
		\$ 95.57	
7000 ft.—1½" Cable consumed during job.....			758.10
300 ft.—¾" Cable consumed during job.....			63.90
Repair required to bring scraper up to same condition as when shipped to Bremerton:			
100 hrs. Welding at 3.00		300.00	
Parts			300.00
218 hrs. Shop time at 2.00		436.00	
		\$831.57	\$1787.34

Mr. Gentner: You have no further evidence?

The Court: Not at present.

Mr. Wagner: Not at this time.

Mr. Gentner: At this time, your Honor, the defendants move to dismiss this action on the ground that, on the facts and on the law, the plaintiff has shown no ground entitling him to relief.

The defendants have two points to raise under this motion; first is a jurisdictional one, and that it is the point that the Court lacks jurisdiction in this case, for the reason that the bringing of the action was not authorized—

The Court: I can hear you later on that. Jurisdiction is never waived.

Mr. Gentner: Yes. All right.

The Court: I can hear it again at the end of the case. [110]

Mr. Wagner: In that connection, your Honor, I did err in concluding my case before completing the record. It was left incomplete at pre-trial, and I would at this time like to supplement the record with the same matters that were involved in the Wheeler case, namely, the delegation of authority by the Administrator under date of June 10th, 1943, the amendment of that date in 8 Federal Register 8027, and, namely, by General Order No. 3; and also the teletype from the regional office to the Portland District Office under date of June 4th, 1943.

The Court: Mark those, Mr. Person. They will get new numbers. They may be admitted. Are you familiar with them?

Mr. Gentner: Yes, your Honor. They are included in the pre-trial order.

The Court: Oh, were they? Numbers were allowed for them there?

Mr. Gentner: 7-(a), (b), (c), (d) and (e) are inclusive of the April 23rd memorandum, which I don't believe has any particular bearing.

The Court: Well, you may straighten that out with Mr. Wagner and Mr. Gentner later as to the numbers of them, Mr. Reporter. They are admitted as trial exhibits.

Mr. Wagner: Thank you.

(Pursuant to the foregoing, Mr. Wagner presented the following pre-trial exhibits to the Reporter: [111])

“Amendment 1 to Revised Administrative Order No. 17,” “Order defining and delimiting certain Functions and Powers of Officers and Employees” dated October 2nd, 1942, signed Leon Henderson, Administrator, was marked Plaintiff’s Pre-Trial Exhibit 7-(a) and also marked “and trial”;

Document entitled Rev. Gen. Order 3, “Representation of Administrator in Court proceedings service in process”, dated June 10th, 1943, signed George J. Burke, Acting Administrator, was marked Plaintiff’s Pre-Trial Exhibit 7-(b), and also marked “and trial”;

Document entitled “Administrative Order No. 4, Part I, Supplement No. 7, Basic Field Enforcement Organization and Authority”, dated December 4, 1943, and signed Chester Bowles, Administrator, was marked Plaintiff’s Pre-Trial Exhibit 7-(c), and also marked “and trial”;

Document dated October 23, 1943, headed “Memorandum”, to All Chief Attorneys, All Chief Enforcement Attorneys, All District Officers”, from Ben C. Duniway, Regional Attorney, etc., headed “Decentralization” and not signed, was marked Plaintiff’s Pre-Trial Exhibit 7-(d), and also marked “and trial”; and [112]

Copy of teletype dated 6-4-43, to McDannell Brown, Chief Enforcement Attorney, Portland District Office, OPA, and signed John T. McTernan,

Regional Enforcement Attorney, was marked Plaintiff's Pre-Trial Exhibit 7-(e), and also marked "and trial.")

PLAINTIFFS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 7 (a)

"Part 1305—Administration

"(Amendment 1 to Revised Administrative
Order 1)

"ORDER DEFINING AND DELIMITING CER-
TAIN FUNCTIONS AND POWERS OF
OFFICERS AND EMPLOYEES

"Paragraphs (a) and (c) of Section 1305.2 are amended to read as set forth below:

"Section 1305.2 Order defining and delimiting certain of the functions and powers of officers and employees—Institution of civil proceedings. The General Counsel or the Acting General Counsel, the Associate General Counsel or the Acting Associate General Counsel, the Assistant General Counsel in charge of the Enforcement Division or the Acting Assistant General Counsel in charge of the Enforcement Division, all Regional Attorneys or Acting Regional Attorneys and all Regional Enforcement Attorneys or Acting Regional Enforcement Attorneys are authorized to institute, in the name of the Administrator, appropriate civil actions or proceedings; and any of them may authorize any other attorney employed by the Office of Price Administration to institute any designated civil action or proceeding. Except as herein provided, no other

officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, has authority to institute proceedings on behalf of the Administrator.

“(c) Appearance for the Administrator. The General Counsel or the Acting General Counsel, the Associate General Counsel or the Acting Associate General Counsel, and the Assistant General Counsel in charge of the Court Review, Research, and Opinion Division or the Acting Assistant General Counsel in charge of the Court Review, Research, and Opinion Division are each authorized to appear for and represent the Administrator or the Office of Price Administration in any action or proceeding instituted against the Administrator or the Office of Price Administration in the Emergency Court of Appeals; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Administrator or the Office of Price Administration in any such action or proceeding. The General Counsel or the Acting General Counsel, the Associate General Counsel or the Acting Associate General Counsel, and the Assistant General Counsel in charge of the Enforcement Division or the Acting Assistant General Counsel in charge of the Enforcement Division are each authorized to appear for and represent the Administrator or the Office of Price Administration in any other action or proceeding; and any of them may specifically authorize any attorney employed by the Office of Price

Administration to appear for and represent the Administrator or the Office of Price Administration in any other action or proceeding.

“(d) Effective date. * * *

“(1) This Amendment No. 1 (Section 1305.2 (a), (c) to Revised Administrative Order No. 1 shall become effective this 2nd day of October, 1942.

(Pub. Law 421, 77th Cong., WPB Dir. 1 7 F. R. 562, Supp. Dir. No. 1A, 7 F. R. 698, 2229, 2729; Supp. Dir. 1B, 7 F. R. 925, 1493; Supp. Dir. 1C. 7 F. R. 1669; Supp. Dir. 1D, 7 F. R. 1792; E. O. 9125, 7 F. R. 2719; Supp. Dir. 1E, 7 F. R. 2965; Supp. Dir. 1F, 7 F. R. 3362; Supp. Dir. 1H, 7 F. R. 3478, 3877, 5216, 6211; Supp. Dir 1G, 7 F. R. 3546; Supp. Dir. 1J, 7 F. R. 5043; Supp. Dir. 1L, 7 F. R. 7200, 7281; Supp. Dir. 1M.

“Issued this 2nd day of October 1942.

“LEON HENDERSON,
Administrator.

“(F. R. Doc. 42-9835; Filed, October 2, 1942; 4:51 p. m.)”

PLAINTIFFS' PRE-TRIAL AND TRIAL EXHIBIT NO. 7-(b)

Federal Register, Volume 8, Number 116, Washington, Saturday, June 12, 1943, Page 8207:

“(Rev. Gne. Order 3)

“REPRESENTATION OF ADMINISTRATOR IN COURT PROCEEDINGS SERVICE OF PROCESS

“General Order No. 3 is revised and amended to

read as follows: Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Orders 9125, 9250, 9280 and 9328, the following order is prescribed:

“(a) Institution of and intervention in civil proceedings. The General Counsel, the Director of the Enforcement Division or the Acting Director, the Regional Attorneys or the Acting Regional Attorneys, and the Regional Enforcement Attorneys, are each authorized to institute and intervene in appropriate civil actions or proceedings, in the name of the Price Administrator; and any of them may authorize any other attorney employed by the Office of Price Administration to institute or intervene in appropriate civil actions or proceedings in the name of the Price Administrator. Except as herein provided, no other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, has authority to institute or intervene in proceedings on behalf of the Price Administrator.

“(b) Service of process upon the Administrator. Service of process upon the Price Administrator may be made by serving him personally, or by leaving a copy thereof at the Office of the Secretary, Office of Price Administration, Washington, D. C., No other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, is authorized to accept service of process on behalf of the Price Administrator or enter his

appearance in any action or proceeding, except as herein provided.

“(c) Appearance for the Administrator in defensive suits. The General Counsel or the Acting General Counsel, the Director of the Enforcement Division or the Acting Director, and the Assistant General Counsel or the Acting Assistant General Counsel in charge of the Court Review, Research and Opinion Division are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any action or proceeding instituted against the Price Administrator or the Office of Price Administration in the Emergency Court of Appeals and in proceedings for the review of determinations of the Emergency Court of Appeals in the Supreme Court; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any such action or proceedings. The General Counsel or the Acting General Counsel, and the Director of the Enforcement Division or the Acting Director are each authorized to appear for and represent the Price Administrator or the Office of Price Administration; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any other such action or proceeding.

"Issued and effective this 10th day of June 1943.

"GEORGE J. BURKE,

Acting Administrator.

"(F. R. Doc. 43-9454; Filed, June 10, 1943;
3:51 p. m.)"

PLAINTIFFS' PRE-TRIAL AND TRIAL
EXHIBIT NO. 7-(c)

ADMINISTRATIVE ORDER NO. 4,
PART I, SUPPLEMENT NO. 7

Basic Field Enforcement Organization and
Authority

1. Purpose. The purpose of this Order is to define the organization and authority of regional enforcement divisions and district enforcement Sections.

2. Regional Enforcement Division.

A. Organization. The Regional Enforcement Division, under the direction of the Regional Enforcement Executive, shall operate through six sections. These sections, corresponding to the National Office Divisions, Shall be:

1. Food Enforcement Section
2. Apparel and Industrial Materials Enforcement Section
3. Fuel and Consumer Goods Enforcement Section
4. Rent and Services Enforcement Section
5. Field Operations Section
6. Litigation Section

B. Functions.

1. Regional Enforcement Executive. Subject to the provisions of Administrative Order No. 4, Part 1, (Revised), the Regional Enforcement Executive is responsible for the direction and conduct of all enforcement activities in the region.

2. Commodity Sections. Each regional commodity section shall be given the widest authority and responsibility in the supervision, direction and conduct of enforcement activities in its respective commodity field. It shall (a) adapt national programs to fit regional characteristics, develop supplementary regional programs as needed and direct the execution of all enforcement programs; (b) supervise commodity enforcement activities to insure uniformity of action and adherence to national and regional policies; (c) direct the allocation of manpower within allotted percentages; and (d) assist in the conduct of significant cases and keep the district enforcement staffs fully informed of enforcement and regulation developments.

3. Field Operations Section. This section shall be the staff assistants of the Regional Enforcement Executive and shall be responsible for field organizational and general operating problems, general coordination of enforcement problems crossing commodity lines, including those in ration banking procedures, counterfeiting, safeguarding of ration currency, reporting and statistics, and training procedures and programs.

4. Litigation Section. This section shall have general responsibility for the technical conduct of

judicial proceedings and administrative sanction proceedings within the region. It may participate in or conduct litigation either cases as it may be specifically authorized to handle by the National Office.

3. District Enforcement Section

A. Organization. The District Enforcement Section, under the direction of the District Enforcement Attorney, shall operate through four commodity units, in addition to the office of the District Enforcement Attorney. These units shall be:

1. Food Enforcement Unit

2. Apparel and Industrial Materials Enforcement Unit

3. Fuel and Consumer Goods Enforcement Unit

4. Rent and Services Enforcement Unit

Wherever possible, enforcement attorneys shall be assigned full-time to a specific enforcement unit; in smaller offices, however, some enforcement attorneys may be assigned to handling the litigation and similar activities of more than one commodity unit. In those district offices where a commodity unit is of less than full-time importance for one investigator, that commodity field, to assure continuity of action, shall nevertheless be assigned to an investigator in addition to his other duties. Special investigators assigned to the district office with territorial responsibilities extending beyond the district shall be attached to the appropriate commodity unit and shall be subject to the direction of the regional office commodity section.

B. Functions.

1. District Enforcement Attorney. Subject to the provisions of Administrative Order No. 4, Part I (Revised), the District Enforcement Attorney is responsible for the direction and conduct of all enforcement activities in the district. Through his staff he shall coordinate the operations of the commodity units, including reporting and statistics, and train investigators and attorneys. His function relating to recruitment, training, reporting, and other operating problems crossing^e commodity lines may be performed through a Chief Investigator, if the District Enforcement Attorney so determines.

2. Commodity Units. Each district commodity unit shall be given the widest authority and responsibility in the conduct of enforcement activities including the ascertainment and investigation of violations, the selection and application of appropriate sanctions to the extent that such authority has been delegated to the district office, and the control of investigative time devoted to various commodity fields to meet allocated percentages.

4. Field Stations. Wherever important manufacturing, producing or wholesale activities are centered in cities other than the city in which the District Office is located or where the district extends over a particularly wide area the District Enforcement Attorney may, with the approval of the District Director, Regional Enforcement Executive and the Regional Administrator, assign investigators to be stationed (as duty stations) at a defense-rental area office or at a local board in

such city. Investigators assigned to these stations shall, so far as practicable, be given specific commodity responsibility, shall receive all assignments from and report exclusively to their supervisor in the district office enforcement staff, and shall not accept assignments from the local board or area rent office staffs without authority from their district office supervisor.

5. Authority to Take Enforcement Action.

A. Authority Retained in the National Office.

1. Appeals. All appeals will be considered and many will be handled in the National Office. Notice of any appellate step taken against the Administrator, together with all pertinent documents, shall be forwarded promptly to the National Office, and no appellate step on behalf of the Administrator shall be taken without prior clearance by the National Office.

2. Defensive Suits. In all cases brought against the Office of Price Administration or its officers or employees for acts done or contemplated in the performance of their duties, the National Office shall be notified immediately and all available information and documents relating to the suit shall be forwarded to it.

3. Special Cases. Exclusive authority to handle various enforcement activities may be reserved by the National Office either in enforcement instructions or by specific instruction in any particular matter.

4. Briefs and Memoranda of Law. All briefs

and memoranda of law on questions of national importance will be prepared by or under the direction of the Enforcement Department of the National Office.

B. Regional Offices. Except as provided in paragraph A, authority to conduct all enforcement activities, including the institution of litigation and the referral of criminal cases to United States Attorneys, is delegated to all regional offices.

C. District Offices. The Regional Enforcement Executive is required to delegate authority to conduct all enforcement activities, including the institution of litigation and referral of criminal cases, to all district offices adequately staffed to assume these responsibilities. The power to handle any specific matter or litigation of regional or national importance is reserved to the Regional and National Offices.

D. Delegation within Regional and District Offices. Commodity chiefs in the regional and district offices should be given very broad responsibility and authority in handling enforcement activities within the commodity fields. Similarly, investigators should be given authority to close out cases where no violations are disclosed, to issue admonitory letters over the signature of the District Enforcement Attorney, to conduct compliance conferences, prepare license warning notices, conduct treble damage settlement negotiations subject to the final approval of the District Enforcement Attorney, and perform such other functions as may be feasible, including the submission of evidence in

and conduct of administrative sanction proceedings. Authority so delegated shall be accompanied by instructions to insure that actions taken under the delegation are consistent with enforcement policies and practices within each office among all offices.

6. Relations with Local Boards. Complaints of price violations by retailers in fields in which price panels are authorized to function shall be referred to the appropriate price panel unless the district director concerned has determined that the price panel is not effective, or the complaint is incident to other enforcement operations. Complaints of consumer rationing violations should be referred to the appropriate local board if the board is in a position to take effective action to dispose of the violation.

Cases which price panels refer in accordance with established procedures, to the district office enforcement staff for actions shall be given priority in handling.

CHESTER BOWLES,
Administrator

December 4, 1943.

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 7-(d)

April 23, 1943

Memorandum

To:

All Chief Attorneys

All Chief Enforcement Attorneys

All District Officers

From:

Ben C. Duniway

Regional Attorney

John T. McTernan

Regional Enforcement Attorney

DECENTRALIZATION

Last January the District Offices were given authority to dispose of cases by all methods short of sanction without clearance from the Regional Office. This authority included disposition by dismissal after investigation, closing by compliance conference or warning letter, settlement by contribution or compromise of the Administrator's cause of action. Subsequently authority to issue license warning notices was given to all District Offices with the exception of Spokane, Klamath Falls, and Sacramento. Effective immediately all District Office will have authority to institute litigation for the purpose of invoking sanctions in all types of cases except criminal cases.

(This memorandum covered a great many matters pertaining to office organization and all is de-

leted save and except that pertaining to the delegation of authority to institute actions, found on page 6 as above.)

PLAINTIFF'S PRE-TRIAL AND
TRIAL EXHIBIT No. 7-(E)

TELETYPE

8PD SF 6-4-43

Mr. McDannell Brown, Chief Enforcement Attorney, Portland District Office, OPA. Effective immediately your office will have full authority to authorize and initiate sanction cases in accordance with the provisions of memorandum of April 23 announcing the enforcement program. It is felt here that you personally must play an important part in this work in order to bring to bear upon the problems presented your maturity of judgment and experience as well as to supervise and develop the members of your staff. We shall expect that all sanction cases initiated in your district will have been discussed by you with the attorney handling the case.

JOHN T. McTERNAN,
Regional Enforcement
Attorney

Mr. Gentner: The second point goes to the merits of this controversy, and I might say to the very heart of the controversy, and that affects the contention on which this entire action is based.

The defendants claim that under the regulation no fully-operated rate is provided for; in fact, a fully-operated rate is prohibited by the terms of the regulation; and, therefore, that there is neither any ground for any action here, nor any violation disclosed, nor any evidence of any violation before the Court. Will the Court care to hear me?

The Court: You have witnesses here on one fact question—excessive wear and tear, as I understand?

Mr. Gentner: Well, that would become operative if—you see, the point is that both theories, of course, could not prevail. If the plaintiff established, as Mr. Wagner has stated, that there is a fully-operated rate in effect as of March 31, 1942, that settles the matter. If, however, there is no such rate established, then that also settles the matter, one way [112½] or the other.

The Court: Well, where does the extraordinary wear and tear come in, in mitigation, to use his word, as used in the pre-trial?

Mr. Gentner: Well, if a violation were established, then we would be entitled to an offset as to unusual wear and tear.

The Court: To the extent of the actual expenditures which we were able to establish, that is true. I think if you have witnesses here you had better put them on. My idea about this case, my hope about it at the end of it is to make findings of fact on everybody's contention, as I did in the Wheeler case.

Mr. Gentner: Yes, your Honor.

The Court: So there will be a record, as you might say, in the alternative, before the Circuit Court of Appeals, should there be an appeal.

Mr. Gentner: Very well, your Honor. I will ask Mr. Kuckenberg to take the stand, then.

HENRY KUCKENBERG

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gentner:

Q. Your name is Henry Kuckenberg? [113]

A. Yes, sir.

Q. And you reside here in Portland, do you, Mr. Kuckenberg?

A. Yes.

Q. You are a member of the partnership known as Kuckenberg Construction Company, defendants in this case?

A. Yes, I am.

Q. And did you have, during the years 1942 and '43, charge of the company's operations and office?

A. Yes, I did.

Q. Would you rather specify the nature of your duties, Mr. Kuckenberg? Were you a general manager or how?

A. Yes; I am the manager of all operations.

Q. In connection with the contract with A. J. Goerig, are you familiar with that?

A. Yes, I am.

Q. And was that negotiated with you?

A. Yes, with me personally.

(Testimony of Henry Kuckenberg.)

Q. The original contract, which is entitled Defendants' Exhibit 24, Pre-Trial Exhibit 24, that is the contract dated November 30th, 1942. That was signed by yourself, I assume, was it not?

A. Yes, it was.

Q. That covered rental of certain construction equipment, did it not? A. Yes. [114]

Mr. Gentner: Is that Pre-Trial Exhibit available?

Q. This is also signed by A. J. Goerig, I notice, and it says "Accepted. G. W. Walsh." Now could you state, Mr. Kuckenberg, who made the representations to you in regard to the nature of the soil conditions up there on this job that induced you to rent this equipment to A. J. Goerig?

A. Well, Mr. Walsh first came to our office representing Mr. Goerig and requested the rental of certain equipment for this particular job, and while requesting the rental of this equipment we discussed, or he told us the conditions under which the equipment would be working.

Q. And what conditions were represented to you as obtaining?

Mr. Wagner: Objection. Mr. Walsh is available and I think that if the question here as to the conditions or representations that go actually to establishment of the fact, the ultimate fact we are getting at, this witness' testimony would purely be hearsay.

The Court: He may answer, subject to the objection. I wonder who this Walsh was. Is he going to be a witness for the defendants?

(Testimony of Henry Kuckenberg.)

Mr. Gentner: Not for our side, your Honor.

The Court: Are you intending to call Walsh?

Mr. Wagner: No, your Honor.

The Court: I wonder if he is the man who was a witness in a contract case I tried here last fall. Wait until I [115] think of the name of it. What was the name of that man?

The Witness: Elliott Construction Company?

The Court: There is nobody in my staff good at remembering names. Elliott Construction Company?

The Witness: Yes.

The Court: Is that the same Walsh?

The Witness: I rather think it is—kind of a heavy-set man.

Mr. Gentner: Q. What did Mr. Walsh represent conditions would be on this job?

A. Well, it was represented to us that it was a normal job; that is, that the wear would not be excessive; that it was loamy soil, with some gravel in it—a very desirable job for a carryall and tractor operation.

Q. Based on that, then, you entered into this contract to rent the equipment, did you?

A. Yes, sir.

Q. And did you go up there yourself after the equipment went up there on the job?

A. Yes, after the equipment had worked there, oh, a week or ten days, I went up there.

Q. And what condition did you find?

A. Well, the equipment was in very bad condition. The soil condition was entirely different. It

(Testimony of Henry Kuckenberg.)

was a glacial soil condition there. The sand was very sharp and very erosive, [116] and the gravel and sand were both very tight. It was rather a cement gravel, and we found that they were excavating small hangars out of a bank where planes would eventually go into and these hangars were approximately 200 feet in diameter and they were circular and they were attempting to excavate this material, going around in a circle, with our equipment and with a tractor in the front and a carryall and a pusher cat. They have an overall length of approximately 75 feet and they were trying to excavate that amount of circle in a 200-foot diameter circle.

Mr. Gentner: Your Honor, I have here a picture I located since the pre-trial which accurately shows the setup of a tractor, carryall, a tractor and the manner of operation. This is done at the shipyard here, one of these. I think this would give the Court a better idea than any picture in the pre-trial there. I didn't find it at that time and it would really disclose what we are talking about, and the length of it. I would like to offer that in evidence.

Mr. Wagner: No objection.

(Thereupon the picture of "Caterpillar" Diesel D8 Tractors and LeTourneau Carryall Scraper, so offered, was received in evidence and marked Defendants' Exhibit 32.)

(Testimony of Henry Kuckenberg.)

Mr. Gentner: Q. Referring to Exhibit 32, you say the over- [117] all length from the beginning to the end is about how much? A. 75 feet.

Q. About 75 feet. And this combination of two tractors and the carryall is constructive for what type of operation, circular or straight-ahead operation?

A. Straight-ahead operation is the one that you can really successfully defend.

Q. Can you explain to the Court why that is?

A. Well, there would be one pulling and the other pushing the scraper at an angle. The one pulling at an angle and the one pushing at an angle just cramps everything and tears it to pieces.

The Court: Which piece do you call the carryall?

A. The one in the center; the one that loosens the dirt, and the other is the tractor.

The Court: What is the name of that preacher?

A. Bob LeTourneau.

Mr. Gentner: Q. This is LeTourneau, is it?

A. Yes; that is a LeTourneau scraper.

The Court: Did you read the article about it?

A. Yes.

Mr. Gentner: Yes, I did, your Honor. It is quite an article, too.

Q. What is the weight of one of these carryalls?

A. The carryall weighs about 35,000 pounds empty. [118]

Q. Loaded?

(Testimony of Henry Kuckenberg.)

A. Well, it holds about eighteen to twenty-five yards of earth, at about 2,500 pounds per yard.

Q. It might run as much as thirty tons of load on top of seven and a half tons of scraper?

A. That is the scraper line, and each tractor weighs about 40,000 pounds each.

Q. And the weight, this weight that you have described on these carryalls, is borne on tires, is it not? A. On rubber tires.

Q. And these carryalls are also referred to as cans, are they not? A. That is right.

Q. What is the effect of loading in a circle, if you will explain, on the carryalls?

A. Well, it cramps them. You have a pulling action and a pushing action and it just cramps the whole thing, and it breaks them open on the side, and in loading and turning, why, it breaks the cable because your cable tightens up the slack as you go around the curve and you have no control of it really. Then you break tongues on your scraper; you break your drawbars and your tractor, and it is just very expensive operation, and it is an unnatural operation for that type of equipment.

Q. What effect does it have upon the body of the carryalls? [119]

A. Well, it breaks the seams open and it throws it out of alignment. The entire frame from it has that effect on it.

Q. Racks the frame, does it?

A. Racks the entire frame.

(Testimony of Henry Kuckenberg.)

Q. And these carryalls have at the bottom what is known as a scraper, do they not?

A. A cutting edge.

Q. How do they operate?

A. That is with cable.

Q. I mean, how does dirt get into the carryall?

A. Well, there is a cutting edge. The cutting edge is dropped down. That is in the front of the entire bowl.

Q. That is at the bottom?

A. Yes, at the bottom of the entire bowl, as it pulls the head up; that is the cutting edge, and the dirt ploughs into it.

Q. What effect does that circular loading have on the tires?

A. If you cramp your tire rolling ahead they push over to the side with that enormous weight on top of it. It has a tendency to tear the tires almost off the rims. In fact, several times it pulled the rim locks off the siding and blew the tires out.

Q. What do these tires cost apiece.

A. Approximately \$500 each.

Q. Now on this particular job what effect did this circular [120] loading have upon the tires, insofar as racks were concerned?

A. Well, pushing the scraper over to the side the racks would get in the center of the back tires, because the tires were all dual tires on this particular equipment and getting in between the two tires in operation it would have the tendency to blow the tires out.

(Testimony of Henry Kuckenberg.)

Q. And on this job what conditions were there that affected the tracks and their life?

A. Well, the particular material that we were working in wore out tracks and the rollers and sprockets and idlers, in approximately 500 hours of operation, whereas normally we would get from 3,000 to 5,000 hours, which is an average of about 4,000 hours. An hour wear was very excessive on this particular job.

Q. What was the condition of the equipment, tractors and carryalls when they went on this job?

A. They were all in excellent condition.

Q. Well, can you specify? Were any of them new?

A. One of the tractors and carryalls was practically new. It had been used on our Spokane contract; oh, possibly sixty days before it came on this particular contract.

Q. Can you state whether or not any of this equipment was overhauled before being taken up there?

A. It was all overhauled, had to be in shape. I would say it was in 90 per cent condition when it went up there—all of [121] it.

Q. Can you describe the conditions that did affect the life of the track assembly on the tractors?

A. Well, the soil condition was the main factor in there. The tractors—this was not a tractor and carryall job at all. It was a job that should have been done with a shovel and rubber-tired trucks,

(Testimony of Henry Kuckenberg.)

because of the excessive wear on tracks and rollers and sprockets and other wearing parts.

Q. Now when you found this condition to exist, what took place?

A. Well, after our equipment had operated up there about a week or ten days we had all this breakage, this unusual breakage, we went up there and conferred with Goerig's men, and asked them to come over, and I believe that they finally came to Portland. Then we had a meeting here in Portland after we had been up there and we shut the operation down.

Q. You closed the operation down?

A. We closed the operation down, and Goerig said we would meet here in Portland. Then we met here at the Benson Hotel in Portland and they admitted then there was an unusual condition there and an unusual wear on our equipment.

Q. Did they also admit misrepresenting the contract?

A. Yes, they did. And we covered that in our addendum to the contract, which they signed at the time.

Q. This Pre-Trial Exhibit 25, dated January 9th, 1943, that is what you refer to? [122]

A. Yes, that is it.

Q. Signed by yourself and A. J. Goerig?

A. Yes, sir.

Q. Now as a result of that meeting did you state that you would refuse to continue the operation of the equipment up there?

A. Yes, we did.

(Testimony of Henry Kuckenberg.)

Q. And what was the result of this conference and their appraisal?

A. We told Goerig that the only fair thing was they should pay for the unusual wear on——

Q. Let me ask you this, Mr. Kuckenberg: When you were to continue up there what did you do?

A. Well, we wanted to take our equipment off but it was a war job up there, one that had to be continued, and they had no other equipment available, so they said, and they said that they were willing to pay something for the additional wear and tear, and we suggested that they just pay for the parts that we put on there, that our superintendent on the job and their man would agree upon were due to excessive and unusual wear and tear, but they wanted——

Q. That is, the actual cost, the actual expenditures?

A. Yes; but they wanted something definite. They made us an offer of \$2.00 an hour for the unusual wear and tear, and finally we agreed upon that. [123]

Q. Now did you discuss this matter with the local office of the OPA?

A. Yes. Before we entered into this we had about a two-days' session here. I think—yes, we were about two days here together, and during that discussion, why, we called the Office of Price Administration and asked them just how we could handle this, and they told us to draw—to come to some agreement on a price and then draw up an agree-

(Testimony of Henry Kuckenberg.)

ment and have both parties sign it, and that was the proper way to handle it, which we did.

Q. Now then, you continued under that contract, then, did you? A. Yes, we did.

Q. What conditions existed then on that job, from then on?

A. Well, we had many, many breakdowns. Our equipment was down a good portion of the time for repairs, and finally we got work of our own, and our contract was that we had rented them the equipment up there for sixty days and we had the right, after that period, to recall our equipment. So we had other work for it here and told them that we would give them a reasonable length of time in which to secure other equipment, so I think we wrote them a letter, or I wrote them and told them we would give them two weeks in which to get other equipment, and at the end of that time we would like to get our own equipment back. So we sent our trucks up there to get it, and the Army Engineers stepped in and wouldn't let us [124] take the equipment off the job until it was finished.

Q. Was there, in addition to the unusual conditions, a condition occurring by reason of the Goerig people themselves?

A. Well, yes. When we drew up this addendum to our original contract we insisted that we send a man up there to watch the operation and to see that the equipment was being properly operated; that they were running two shifts, and our man was

(Testimony of Henry Kuckenberg.)

there a good part of the two shifts but no always, but it seemed that any time he would leave, why, they would go right back into an operation that would damage the equipment. As long as he was there and watching it he would keep them pretty well straightened up, as much as possible, and keep a ripper on there. That was another thing that was very hard on the equipment. They had an idea it was economical not to rip this material because it entailed the use of one more tractor, but just as soon as he would leave them and quit the ripping they would go right on, and it was hard and very severe on the equipment.

Mr. Gentner: Your Honor will recall, at the time of the pre-trial I had here the original payrolls, both from Bremerton and from Portland, and the original daily report sheets, all of the original invoices on this job, and due to the great volume of them and the difficulty of having the Reporter designate them, your Honor suggested that we take them back with us and offer them at the trial. [125]

Now I have here all of the original payrolls, both at Bremerton and at Portland, that relate to this matter of unusual wear and tear. We have our daily report sheets here for every day on the job. We have here all of the time sheets; we have here all of the invoices, covering all parts purchased; and, in fact, for every item as disclosed by our summaries that we offered in evidence. We have the Defendants' Exhibit 11, Summary of Invoices. Then

(Testimony of Henry Kuckenberg.)

we have also a recap cost summary. We have Defendants' Exhibit 8, the cost summary, Bremerton Airport rental. We have Exhibit 9, the Portland payroll totals, and Exhibit 10, the hauling charges, and we are offering all of these documents in evidence in support of our summaries that we have introduced and offered.

Q. Mr. Kuckenberg, do these yellow sheets also have any connection, or are they just your work sheets?

A. I think they are just work sheets.

Mr. Gentner: Work sheets. I have here two folders for these. I could ask the witness to identify these.

The Court: Mr. Person will mark them. There is no dispute about them, is there, Mr. Wagner?

Mr. Wagner: Not as to their identity.

The Court: No.

Mr. Wagner: I don't like to be difficult in connection with this evidence. I realize it is difficult. It is a difficult problem for Mr. Gentner and Mr. Kuckenberg probably, and [126] I want to be as reasonable as I can, but I would like to reserve a standing objection, and in connection with the identity I would like to say this: That Mr. Kuckenberg's operations, as I understand it, include other jobs. His operations are very extensive and his equipment bore a great many more pieces than just these few that are involved here, and those other pieces of equipment were also being operated on other jobs at the same time. Now just exactly how Mr. Gen-

(Testimony of Henry Kuckenberg.)

tner desires to apply, or have connected, this particular evidence to this particular job I don't know, but I think that was the point, the only point that is at issue here, as far as we are concerned.

The Court: Mr. Gentner, you will save Mr. Wagner's embarrassment by having the witness identify these two folders.

(The two folders were marked Defendants' Exhibits 33 and 34, respectively.)

The Court: Give them to the witness and have him tell what they are.

Mr. Gentner: Q. What is the first folder?

A. Exhibit 34——

The Court: One question covering both of them will be all right.

Mr. Gentner: Q. Will you kindly identify the contents of Exhibits 33 and 34? Will you kindly identify them?

The Court: You can ask him a leading question. You sum [127] up what is in there, Mr. Gentner.

Mr. Gentner: Q. Mr. Kuckenberg, you have in there—just go through that and tell what it is. That is the easiest way.

A. Exhibit 34 covers all the invoices for repairs that have been placed on the particular tractors that were used at Bremerton. I don't think they are all unusual, or are all charged to unusual wear and tear. I think a great many of them are just ordinary maintenance, but we have——

Q. Now in connection with that——

(Testimony of Henry Kuckenberg.)

Mr. Wagner: Let the witness go ahead.

Mr. Gentner: Just a minute.

Q. In connection with that Exhibit 8, called "Cost Summary", would you kindly give this to the witness. Let the witness see that. Did you make this segregation yourself of the invoices?

Mr. Wagner: Now wait just a minute, Mr. Gentner. Let the witness identify it. I would appreciate it if he would identify the folder.

Mr. Gentner: All right. Go ahead.

Mr. Wagner: In the first place, before you introduce any recapitulation of something.

Mr. Gentner: No. But that is along the line he was testifying to.

Q. Let me ask you this: Do the invoices that you have there correspond with the invoices that are shown on this Exhibit 8? [128]

A. Yes, they do.

Q. This summary? A. Yes, they do.

Q. In other words, what you have there is the invoices that you have on your summary, entitled Exhibit 8? A. Yes.

Q. That covers all of the repairs that were made on all of those pieces of equipment, both for unusual and ordinary wear and tear?

A. That is right.

Q. That is right, is it not?

A. Yes, that is correct.

Q. O. K. Now I have here Exhibit 9, showing summary of Portland payroll totals. Did you prepare that?

(Testimony of Henry Kuckenberg.)

A. Yes. It was prepared under my supervision.

Q. And do you have in those folders the payrolls, the original payrolls supporting the summary that you have here, Exhibit 9?

A. Yes. They are in this folder.

Q. Those are the payrolls supporting that?

A. Yes.

Q. All right. Now I have here Exhibit 11, called "Summary of Invoices". Was that prepared by you?

A. Yes; under my supervision.

Q. And are there in those folders the original invoices supporting the summary that you have made up there? [129]

A. Yes, sir.

Q. And here is Exhibit 10, hauling charges. Are the invoices in those folders supporting those?

A. Yes, they are.

Q. Now further, you have in there some daily report sheets. Would you describe what those are, who makes them up, and what they tell?

Mr. Wagner: May I interpose a question, first?

Mr. Gentner: Surely. Go ahead.

Mr. Wagner: In these summaries, Mr. Kuckenberg, I take it that these summaries are tabulations of all of the invoices in those respective folders; is that right?

A. That is correct.

Mr. Wagner: And I understood you to say that the invoices as contained in those folders, particularly in connection with repair bills, included not only those bills that were the result of extraordinary

(Testimony of Henry Kuckenberg.)

wear or unusual tear but also the ordinary operating and maintenance repairs?

A. That is correct.

Mr. Wagner: Is that right?

A. That is correct. That is covered by our summary here.

Mr. Wagner: Is there any description of those?

Mr. Gentner: Yes, there is.

Q. Now I will hand you Exhibit 26 and ask you, have you prepared that? [130]

A. That was prepared under my supervision also.

Q. Now that has a list, does it not, of each particular part that went to each particular tractor designated by number? A. That is correct.

Q. Each tractor and each carry-all bore a certain number, did it not? A. That is right.

Q. Numbered and designated on the job. Now that list there segregates each part to the particular machine that it was applied to, does it?

A. That is right.

Q. And did you make a segregation of the ordinary wear and tear from the usual wear and tear?

A. Yes. It was all made under my supervision.

Q. And who assisted you with that?

A. Lee Gordon, who was our General Superintendent, and Gordon Giebisch was the resident foreman or the superintendent on the Bremerton job. The three of us made it up.

Q. And you segregated the ordinary wear and tear from the unusual wear and tear, did you?

(Testimony of Henry Kuckenbergl.)

A. Yes.

Q. And your summary covers that?

A. Yes, it does.

Q. Now tell about these daily reports.

A. These are daily reports that were made up on the Bremerton [131] job by the foreman who was in charge of the work.

Q. The first ones were made up by whom?

A. The first ones were made up by Lee Gordon, or under his supervision.

Q. That was up to about January what?

A. January 10th; up to January 10th, they were made by Lee Gordon, or under his supervision. Some of them were made under his supervision.

Q. He was the foreman or superintendent on the job? A. Yes.

Q. And then, from then on to the end of the job they were made up by Gordon Giebisch, were they?

A. They were made up by Gordon Giebisch, yes.

Q. Who was superintendent on the job then?

A. Yes.

Q. These reports showing the—that is, what were they for? What took place?

A. I beg pardon?

Q. What took place on the job?

A. Yes. It is the delivery of the work, showing the equipment that was done at certain times, what was wrong with the equipment, and the time the equipment worked and the down time.

(Testimony of Henry Kuckenberg.)

Q. Now is there anything in those two folders that I haven't asked you about? I see you have the payrolls and the invoices.

A. I think you have covered it all. [132]

Q. And the daily reports. Now then, these summaries that you have, you segregated the ordinary from the unusual wear and tear. Now to your knowledge do they represent the actual expenditures on account of the unusual wear and tear on that job? A. Yes, they do.

Q. And the prices for parts, are they what you actually paid for the parts? A. Yes, they are.

Q. The labor was covered I assume by Union contracts? A. Yes.

Q. And represents Union pay, the actual amount paid out? A. Yes.

Q. And the actual hours put in on those tractors? A. Yes, they do.

Q. How long have you been in the construction business, Mr. Kuckenberg, personally?

A. I have been in business myself since 1922.

Q. How long have you worked in the construction business?

A. Well, several years before the last war. Then I was in the Army during the last war, and then ever since then.

Q. And are you familiar with the average cost per hour for usual and ordinary repairs on the D-8 tractor? A. Yes, I am.

Q. And what does that amount to for the running hour, working [133] hour?

(Testimony of Henry Kuckenberg.)

A. For a tractor and a scraper?

Q. Yes. A. Ordinary?

Q. Ordinary wear and tear.

A. About a little over five dollars an hour.

Q. And what is the cost on this Goerig job, approximately?

A. Well, it runs just about the same. We have ordinary maintenance and repairs. We have spent \$33,750 for some 6,000 and some hours, and it run just very close to what our average cost would be.

Q. What was the total cost on the Goerig job?

A. The total cost was ninety thousand eight hundred —

Q. No, no. I mean for repairs?

A. The total cost for repairs was approximately sixty-seven thousand dollars.

Q. And what would that run per hour?

A. About ten dollars an hour.

Q. In other words, your cost on this job was double the ordinary cost, or \$5.00 an hour over the ordinary operating cost; is that right?

A. That is correct.

The Court: Did they lose money, Gentner?

Mr. Gentner: Yes, they did.

The Court: How much? [134]

Mr. Gentner: Well, we show that they paid out ninety thousand dollars in actual cash and took in ninety-five thousand, and then they had depreciation on their equipment, and the wear and tear. I think they got \$5,000 for the —that is what they

(Testimony of Henry Kuckenberg.)

had left after the job was over, and they had their equipment back in this shape it was in after being ruined in this fashion.

Q. That was up on the job from December until—— A. April.

Q. The end of April. How many dollars' worth of equipment was it?

A. Well, it would represent approximately \$200,000 worth of plant.

Q. Two hundred thousand worth of plant. I think the bare rental on that—what would it be?

A. Forty-six thousand OPA bare rental.

Q. OPA bare rental alone would make \$46,000 without anything more, and you got five thousand out of it? A. Yes.

Mr. Gentner: I think that is all. You may examine, Mr. Wanger.

Mr. Wagner: If the Court please, this case has been quite disconcerting in many aspects. At this particular time we have very, very many extensive records, had we know they existed.

Mr. Gentner: I had them here at the pre-trial, Mr. Wagner. [135]

Mr. Wagner: We certainly would have liked to have gone over them outside of the trial. I think that cross examination on such extensive records would require an awful lot of unnecessary time to the Court and also of counsel. I am suggesting this at this time: That we continue this matter in order that plaintiff and defendant may examine these

(Testimony of Henry Kuckenberg.)

records, and, if possible, come to some agreement as to what is ordinary wear and tear and what is extraordinary wear and tear, without having to go into any extended cross examination as to the facts on it. I think it can be done. We are not unreasonable and haven't been at any time in connection with the examination of records, and it would certainly save an awful lot of valuable time of the Court also, of respective counsel and witnesses, I believe.

The Court: I don't see how you can do that, Mr. Wagner, we have so many other things. I have to go away the first of the year. My calendar is all set up very close with that in mind.

Mr. Wagner: Very well.

Mr. Gentner: I might say to your Honor, the amount of the offset, the most they could be entitled to, would be thirteen thousand some odd dollars, and we show thirty-three thousand actual expenditures.

Cross Examination

By Mr. Wagner: [136]

Q. When this project, Mr. Kuckenberg, was first presented you for consideration were you given any blueprints, maps?

A. No, we were not.

Q. Information or data in writing?

A. No, we were not.

Q. You were not. It was purely a verbal conversation?

(Testimony of Henry Kuckenberg.)

A. Yes. I think the only thing we have was a map showing the location of the field.

Q. Showing the location?

A. Of the field.

Q. Did you give it consideration more than once before entering the contract?

A. No, I didn't. At that time all our work was rush work. We would be called in on a job and we would start possibly the same day, and that is the way this job went.

Q. How much work were you doing along about that time?

A. Well, it was really pretty quiet. We had a good lot of surplus equipment. We were not doing too much right at that particular time, and that was the only reason that we went up there, because previous to that we were quite busy.

Q. How much equipment do you have altogether?

A. You mean in dollars and cents?

Q. Well, in numbers of pieces. How many pieces of equipment?

A. That would be pretty hard for me to answer, Mr. Wagner, without checking. [137]

Q. Would you know approximately?

A. You mean tractors or something?

Q. How many tractors did you have at that particular time?

A. At that time we had approximately twenty tractors, possibly twenty or twenty-two.

(Testimony of Henry Kuckenberg.)

Q. About twenty-two?

A. That is correct.

Q. Tractors. And how many carryalls did you have then? A. Nine carryalls.

Q. Nine carryalls. What other types of equipment did you have?

A. We had shovels, trucks, in the ordinary---

Q. What do you mean by shovels, power shovels? A. Power shovels, tractor shovels.

Q. Gasoline? A. Gasoline or Diesel.

Q. Steam shovels? A. Gasoline or Diesel.

Q. Gasoline or Deisel. No steam? A. No.

Q. What other types of equipment?

A. Just the general run of contractors' equipment.

Q. I am just trying to find out how extensive your equipment is. At this particular time you mentioned a rubber---

The Court: Let's get at it this way: What portion of the total equipment was on this job? [138]

A. I would say a third of it.

Mr. Wanger: Q. About one-third of it?

A. Yes.

Q. And during the course of this job you had other equipment working also?

A. We had some working at Spokane. I don't think we had very much down here. I think most of the plant that we had at Portland went up to the Bremerton job and practically all of the rest of our plant was at Spokane. We might have had one or two tractors working in the shipyard. I don't

(Testimony of Henry Kuckenberg.)

remember exactly. But I do remember that most of our plant went up on this contract.

The Court: Where did you get your experience that you and your brother have in the construction? What organization did you come up through?

A. Through Warren Construction, previous to the war. Then after the war I was with Parker-Schram here about a year.

The Court: You worked with Nat Lynch?

A. Yes.

The Court: And Gill, and all of them?

A. Yes, previous to the war, and after the war I was with them on the contract between St. Helens and Scappoose, that 10-mile stretch.

The Court: With them over in Wyoming, at Casper?

A. Yes. I was at Casper previous to the war, though. [139]

The Court: Yes.

Mr. Wagner: Q. So that about one-third of your equipment was on the Bremerton job?

A. Yes.

Q. Now at the time they presented this job to you, you say it was a rush job? A. Yes.

Q. And you gave it consideration by discussing it with Mr. Walsh and by looking at the map?

A. Well, no. The map didn't enter into the job at all. The map was given to us so we could do whatever was necessary for our equipment there, and was given to the truck drivers that took the

(Testimony of Henry Kuckenberg.)

equipment up there. That is the only reason the map was given to us, showing the road up there.

Q. You discussed it with Mr. Walsh?

A. Yes.

Q. On more than one occasion?

A. No. I think it was just one occasion they came in there and told us what they wanted and, as I recall it, that was the only conversation we had about it.

Q. How much time elapsed between the time that you talked with Mr. Walsh and the time that you started shipping your equipment up there?

A. I think it was just a matter of signing the contract, and possibly a day. [140]

Q. A day?

A. Possibly. I think Walsh took the—we drew up an agreement immediately and I think he took it up to Seattle that same day. He had Goerig sign it and himself and sent it back to us, and the equipment started rolling out immediately.

Q. And how long was it after that that the equipment started working?

A. Well, I would say within a few days.

Q. Within a few days?

A. Uh huh; possibly as soon as we did get up there. It would take a day to get up there, possibly a day to hook up the tractor and carryall and get it ready for operation.

Q. O. K. And you supplied for this particular work of the——

(Testimony of Henry Kuckenberg.)

A. We supplied the equipment, the operators and the fuel, the maintenance and the repairs, everything necessary for its operation.

Q. And who supervised the operation?

A. They had their own superintendents. As far as the operation was concerned, they supervised that.

Q. Did you employ any maintenance men?

A. Yes.

Q. Aside from the operators? A. Oh, yes.

Q. How many?

A. Sometimes as many as five, and we sent mechanics from [141] Portland, from our Portland shop, oh, every time they would get stuck we would send men from Portland. We had two to five maintenance men on the work all the time, and then we sent as many as three and four from Portland up there.

Q. You have your own repair shop?

A. Yes.

The Court: Is that located out there by your plant out in Parkrose?

A. Yes. We have eight acres out there and we have a large shop and a storage space out there.

Mr. Wagner: Q. How soon after the commencement of your operations up there did you first notice that equipment was breaking.

A. Well, when I first noticed it was the first time I went up there. That was approximately two weeks after we had started.

Q. That would be when?

(Testimony of Henry Kuckenberg.)

A. That would be prior to the end of the year, the end of '42.

Q. During December?

A. It would be during December.

Q. Along before Christmas sometime?

A. Well, I would have to look at the records to tell exactly. It was sometime before the first of the year. I do know that Giebisch, Gordon Giebisch went up there the 10th of January and we shut down, and we shut down for approximately a week [142] before he went up there. That is my recollection, without looking at the records. I could look at the records and tell you exactly.

Q. Will you do that?

A. Yes. We started operation on December 12th.

The Court: Look it up during the noon hour. Go ahead to another question, Mr. Wagner.

Mr. Wagner: Q. When you arrived up there, Mr. Kuckenberg, just exactly what took place? What did you do?

A. When I arrived up there the job was already shut down. Mr. Gordon had gone up ahead of me and had shut——

Q. Now by the job being shut down, what do you mean by that?

A. We just stopped our equipment from working. It needed repairs so bad we just shut it down really to get our equipment repaired.

Q. You shut the job down after you arrived?

A. No, I didn't.

(Testimony of Henry Kuckenberg.)

Q. After you arrived there?

A. No. I arrived I think the same day or the next morning, but most of the equipment was broken down from abuse, and we just shut the whole thing down and started repairing it. Then Mr. Gordon called me at Portland and I went up there in the hopes of seeing Goerig and pulling our stuff off. Then we decided we just wouldn't work under those conditions. We could not. [143]

Q. What was the nature of the operations at the time you arrived there?

A. Well, they were not going on at all. They were shut down.

Q. Well, what was the nature of the operations that had been going on then?

A. Well, they were becoming revetments.

Q. What do you mean by revetments?

A. Along the taxiing ways they went into the hillside and in place of being hangars they would have been they dug these hangars out of the bank. That was in case the field was bombed all the planes would not be out in the center of the field.

Q. How many of those were being built?

A. Oh, it would just be a guess on my part. I never did see the planes, but I would guess possibly they will get up to half a dozen in there.

Q. And how long a field was it to be, do you know that?

A. It is a standard field. They had 5,000-foot runways there. My recollection is they had two

(Testimony of Henry Kuckenberg.)

runways, cross runways; then they had a taxi way around it. It is a large field.

Q. Something in excess of a square mile?

A. The entire field?

Q. Yes. A. I would say so.

Q. Was the land wooded or what? [144]

A. Well, around, surrounding the field was wooded, yes, but not on the field. The field had been completed several years before this.

Q. It was an airfield there?

A. Yes; these revetments were a new part of the construction.

Q. And was a part of your construction work building additional runways?

A. Well, of course our work was just renting the equipment. We had nothing to do with the construction.

Q. Well, the work your equipment was doing?

A. Building what?

Q. Additional runways? A. No.

Q. Or additional runways? A. No.

Q. Taxi ways?

A. No. I think that they did—the waste material they took out of the hillside from the revetments, I believe they took some of it, the lengthways or taxi ways, and most of it, as I understood, went out there for waste.

Q. It had to be because of those revetments your equipment was used to build?

A. That is my understanding.

(Testimony of Henry Kuckenberg.)

Q. Did they dig them out?

A. No. They dug them out of the bank, out of the hillside. [145] The taxi way went along the way and there was a sloping hillside along the taxi ways. They just dug in to those hillsides, but they went out with a straight taxi way, or roadway, possibly some 50 or 100 feet. Then there was a round revetment there, or hangar, whatever you want to call it, and that was dug out of the bank. It started about 200 feet in diameter and the back cut was approximately 30 feet and the front possibly a 10-foot cut and that was sloped down so it made it smaller at the bottom.

Q. Your equipment had to take that excessive material where?

A. Well, they hauled it down beyond the taxi way to a dump they had there. It was, possibly, oh, I would say possibly a thousand to twelve hundred foot haul, fifteen hundred feet; then they got further as they went back away from there. The haul got longer.

Q. Did I understand you to say that each of those revetments had to be a 200-foot diameter?

A. At the top the cut was to be 200 feet in diameter.

Q. At the top?

A. At the top; and then they came down on a slope and they were possibly, oh, 100 feet in diameter at the bottom.

Q. Explain that a little bit more fully. I don't understand.

(Testimony of Henry Kuckenbergl.)

A. Well, you take any cut where there is a bank, there is a slope there and it would naturally be wider across the top than the bottom because it is funnel-shaped. Your slope [146] comes down on an angle.

Q. What you mean is that you have an ordinary cone that is inverted? A. That is right.

Q. And that was created by the operations of your machine? A. Yes.

Q. By digging around the base?

A. That is right. Uh huh.

Q. And then you had how many carryalls in operation up there—about four?

A. Yes; four.

Q. And they are all the same size?

A. Yes.

Q. And that size is indicated by the photograph that was introduced here?

A. Yes. Those are model W's. That is what those were up there.

Q. Now you mentioned soil conditions up there. Will you describe that a little bit more fully for us.

A. Well, if that soil condition there is a glacier formation it is very tight. It is very abrasive. It is composed of sand and gravel. In fact, it is so tight the only way you can really dig it efficiently, or economically at all, is to use a ripper in there; then the material is usually abrasive. [147]

Q. What is a ripper?

A. Well, a ripper is a large piece of equipment that has big teeth and these teeth dig in and rip it

(Testimony of Henry Kuckenberg.)

as they go along. It is handled in back of the tractor just like a big rooter plow, except it has three teeth on it.

Q. Did you employ any of that type of equipment up there at all?

A. We finally furnished them with a ripper after we had been up there for some time, but they wouldn't use it.

Q. What do you mean, they? A. Goerig.

Q. Goerig wouldn't use it?

A. Not all the time. We had to bring pressure on him most of the time to get him to use it. It necessitated the use of one more tractor and he was trying to, though it was more economical not to use it.

Q. Now you mentioned the fact that in operating this equipment in a circular manner that rocks would get in between the dual tires.

A. Uh huh.

Q. That often happens, doesn't it, Mr. Kuckenberg, in ordinary operations?

A. Yes, it does sometimes, but it is worse when you are cramping on, sliding on the tires rather than rolling them, because sliding forces them right in there. [148]

Q. And this equipment is built to be steered and can go in a circular manner, can it not?

A. It is not built for loading in a circle, no. It definitely is not. It is not common practice to do it where we get into a tight place like that, and in order to use that type of equipment we would use

(Testimony of Henry Kuckenbergl.)

a dozer and push that equipment to the center where we could take a straight run at it.

Q. What kind of work did your contract call for in the outset?

A. I don't remember. I don't think it indicates any type of work. I think it is just a straight lease contract for rental of equipment.

Q. Rental of equipment?

A. That is right.

Q. And all that you knew was that is was to prepare——

A. No, no, that is not——

Q. And Mr. Walsh didn't tell you——

A. That is not quite right, Mr. Wagner.

Q. Mr. Walsh didn't tell you that it concerned the construction of revetments?

A. No, that is not right. He didn't say what type of work it was. He said that they were borrowing dirt and it was ordinary construction work.

Q. Now after you arrived there and the job was shut down, what occurred after that, Mr. Kuckenbergl?

A. We tried to get in touch with Goerig and ask him to come [149] over there.

Q. Did you? A. Did I what?

Q. Did you get in touch with him?

A. Yes, we got in touch with him.

Q. How soon?

A. Well, I think the first day we were there.

Q. What took place then?

(Testimony of Henry Kuckenberg.)

A. He said that they would rather meet us in Portland; that they could not get away right that particular day or the following day, but they would come to Portland.

Q. And then you came to Portland?

A. Yes.

Q. Without letting your equipment——

A. Without renting it?

Q. Without letting your equipment commence operations again?

A. As I recall it, yes. The equipment was down until we had entered into this addendum to the contract.

Q. Now you had a conference with the Goerig people about the situation? A. Yes.

Q. And as a result of that conference you agreed with the, or the Goerig people agreed with you that some addition be allowed you on your rental?

A. We wanted to take our equipment off of there. I didn't [150] want it on there at all at any price, but they just stated, and begged us practically, that they had to have it there, and we finally told them that we would leave it there but we felt we should be compensated for any unusual conditions and that the job had been misrepresented to us, in the first place, and that should all be done in our addendum, and they signed it.

Q. Can you give me approximately the date of that conference?

A. Well, it would be sometime in January.

Q. It would be in January?

A. I don't remember the date.

(Testimony of Henry Kuckenberg.)

Mr. Gentner: Well, with reference to your contract, the addenda, can you fix the date? How was it in reference to that?

A. Oh, it was possibly three weeks or a month later than the original contract.

Mr. Gentner: No, no.

Mr. Wanger: Q. Than the original contract, and then the agreement for the additional, in connection with signing that would you say about that—a day before or two days before?

A. Before what?

Q. Before you signed the supplemental agreement for rental?

A. Two days before what?

Q. When this conference took place?

A. No. We signed it right there the same day.

[151]

Q. The same day?

A. Well, we were in conference possibly two days, as I recall. Then we drew up the agreement and it was signed right there.

Q. During that conference. Do you indicate it was during that conference you were in touch with the OPA? A. Yes.

Q. What office of the OPA?

A. The party that I talked to, I can't think of his name but he now is a professor at Reed College. I know him through that. I knew his name at the time. I don't know it now but he was head of the machinery, as I recall it.

(Testimony of Henry Kuckenberg.)

Q. Would it be Mr. Stewart?

A. Yes, Stewart.

Q. Blair Stewart?

A. Blair Stewart, yes.

Q. Now what——

A. The reason I know it was Mr. Stewart, we had other conversations with him about other matters, that is concerning the regulation.

Q. What regulation were you referring to?

The Court: Pardon me. We will have to recess now until two o'clock.

(Thereupon, at 11:45 o'clock A. M., a recess was taken until 2:00 o'clock P. M. of November 14, 1944, at which time Court reconvened. [152] and the following further proceedings were had herein:)

Mr. Gentner: If the Court please, on this pre-trial order there was a space at the end where we left off on page 5 and instead of rewriting another page I merely inserted the matter about any violation being willful, at the end of defendants' contentions on page 5, which is agreeable to Mr. Wagner. I furnished him a copy of the paragraph that has been inserted there. That takes care of that matter.

The Court: All right. I will sign it now. Mr. Kuckenberg was on the stand.

Mr. Gentner: Yes. Mr. Wagner has indicated that his cross examination of Mr. Kuckenberg will

be quite extensive and I have a number of witnesses here.

The Court: Yes.

Mr. Gentner: It will be agreeable to put them on and then Mr. Wagner can finish later.

Mr. Wagner: Very well.

The Court: All right. Put them on.

Mr. Gentner: Call Mr. Byrne. Take the stand.

E. E. BYRNE

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows: [153]

Direct Examination

By Mr. Gentner:

Q. Your name is Ed E. Byrne?

A. E. E. Byrne.

Q. E. E. Byrne. And what is your position, Mr. Byrne, or your occupation?

A. I am Manager of the Interstate Tractor & Equipment Company, Caterpillar tractor distributors.

Q. They are the sole distributors for this territory, are they not? A. Yes, sir.

Q. How long have you been in that particular line? A. Since 1931.

Q. And are you thoroughly familiar with operation of Caterpillar tractors? A. Yes, sir.

Q. And the normal life of various parts of Caterpillar tractors? A. Yes, sir.

(Testimony of E. E. Byrne.)

Q. Mr. Byrne, referring to Defendants' Exhibit 27, that is the lithograph of the Caterpillar D8 tractor, is it not?

A. It is a "Caterpillar" D8; that is correct.

Q. That shows, among other things, what is known as a track assembly, does it not?

A. Yes. The track assembly is the part the tractor runs on.

Q. Could you designate the various parts of the track assembly [154] on the various tractors?

A. The track assembly consists of two complete tracks that shows track warehouse forms, with track rollers, sprockets, two sprockets, two front idlers, and four top carrier rollers.

Q. Now Mr. Byrne, what is the average life of a track assembly on a "Caterpillar" D8 tractor under the normal operating conditions?

A. The average life is approximately 4,000 hours.

Q. 4,000 working hours?

A. Yes, sir. That is, operating hours.

Q. 4,000 operating hours, where the tractor is actually running and being used?

A. Yes, sir.

Q. Now there have been a large number of parts purchased from the Interstate Tractor & Equipment Company by Kuckenberg Construction Company for repairs on various tractors during the years 1942 and 1943. You are familiar with the billing to Kuckenberg Construction Company of the charges for those parts?

(Testimony of E. E. Byrne.)

A. I am not familiar with each individual billing. However, all of our parts are billed at OPA ceiling prices.

Q. And would you say the charges made by your company to the Kuckenbergl Construction Company for parts for these tractors were all OPA ceiling prices during that year?

A. Yes, sir. [155]

Mr. Gentner: You may examine.

Cross Examination

By Mr. Wagner:

Q. Mr. Byrnes, is it?

A. Byrne.

Q. Byrne? A. Uh, huh.

Q. You have price lists available for the parts, do you?

A. We have them at our office.

Q. You also sell tractors? A. Yes, sir.

Q. Complete? A. Yes, sir.

Q. And you have price lists for those?

A. Yes, sir.

Q. Do you know of your own knowledge at this time what prices are indicated for various pieces of equipment, such as a D8?

A. Approximately, yes.

Q. Approximately what is a D8 sold for?

A. Eighty-one hundred dollars.

Q. \$8,100? A. Yes.

Q. And is that inclusive of all standard equipment?

(Testimony of E. E. Byrne.)

A. That is the bare tractor itself.

Q. The bare tractor itself. Do you also know what the price [156] of a bulldozer is?

A. The bulldozer, less the power units, sells for a thousand and twenty dollars at the factory.

Q. What about extra equipment, such as with power units?

A. A machine equipped with two-drum power unit, that sells for \$720 at the factory.

Q. It sells for \$720?

A. At the factory.

Q. At the factory. But this machine does come equipped with it?

A. No, it does not.

Q. It does not. That is for a four-drum unit?

A. That is a two-drum unit.

Q. Two-drum. Do you know what the four-drum unit would take?

A. A four-drum power unit?

Q. Yes.

A. It sells for twelve hundred forty dollars at the factory.

Q. Do you carry any line of carryalls?

A. Yes, we do.

Q. Do you carry the LeTourneau line?

A. Not at the present time.

Q. Did you?

A. We did prior to March 1st, this year.

Q. During 1943, then, what did a Model "W" carryall sell for?

(Testimony of E. E. Byrne.)

A. Equipped for eight, eighteen hundred twenty-four. Tires [157] it sold for eighty-six hundred dollars.

Q. Did you make any sale of such equipment to Mr. Kuckenbergs? A. We did.

Q. Did his carryalls come equipped with those kind of tires? A. Yes, sir.

Q. In each instance? A. Yes, sir.

Q. Did Mr. Kuckenbergs's equipment—did you also sell him the tractors during 1942 and 1943?

A. We did in 1942.

Q. You did in 942? A. Yes.

Q. D8's? A. Yes, sir.

Q. Did they come equipped with any extra equipment, that you can recall?

A. Well, they would have miscellaneous guards on them, such as a crankcase guard, and perhaps a radiator guard and engine guards, but no attachments that would operate a bulldozer or a scraper.

Q. Approximately how much money would run into such guards as you have mentioned? How much would they cost?

A. I think the eighty-one hundred dollar price that I gave you on a D8 tractor would include the guards.

Q. Would include the guards? [158]

A. Yes.

Q. Those are also your 1942 prices that you have been giving us here? A. Yes, sir.

Q. When you say that the average life of a

(Testimony of E. E. Byrne.)

tractor approximates 4,000 hours, Mr. Byrnes, what do you mean by average life? What kind of usage would that include?

A. We mean normal usage.

Q. Normal usage? A. Yes.

Q. What do you mean by normal usage?

A. We mean tractors operating under soil conditions that do not contain sand or other abrasive materials.

Q. You said excluding the use of any sand?

A. Yes, sir; and other abrasive material.

Q. Is this equipment that we have been talking about here, is it designed to be used in circular manner when doing its operative work, carryalls and tractors?

A. If the tractor is pulling a large carryall it is not built to load a machine while it is turning.

Q. It is not built to load the machine while it is turning? A. No.

Q. Are tractors built to operate in a circular manner? A. Yes, sir.

Q. Without going beyond the ordinary usage?

[159]

A. Yes, sir.

Q. Likewise that may be stated to be true of carryalls when used in carrying and doing other work than loading?

A. Of course you could not use them unless you were able to turn.

Q. Then the fact they are loaded and used in

(Testimony of E. E. Byrne.)

a circular fashion, or in carrying their load, has absolutely no effect as far as wear and tear are concerned?

A. Will you repeat the question, please.

Q. The fact they are loaded and used in a circular fashion to turn and go about different directions, would not be beyond the normal usage?

A. Not after they are loaded.

Q. Not after they are loaded, but during the period that they are being loaded it would have?

A. Yes, sir.

Q. In normal usage of the carryall approximately what footage of operation is required to load the equipment?

A. It depends on the size of the carryall and whether using a pusher or tractor to help load it.

Q. Will you describe the operations there?

A. A large scraper, such as we are talking about? That is, the Model W LeTourneau?

Q. Yes.

A. Requires a tractor to pull it, requires another D8 tractor [160] to push it when loading.

Q. When loading? A. Yes.

Q. About how long, or over what space of travel is required to get a load on under those conditions?

A. That varies according to the material. It will probably run 75 to 125 feet, or 150 feet.

Q. 75 to 150, or 125 feet, did you say?

A. It will carry from 75 to 150 feet.

Q. Assuming that the carryall is being operated for two tractors, it is loaded in a circular fashion

(Testimony of E. E. Byrne.)

and then operated in ordinary manner after being loaded for a distance of—for a distance ranging anywhere from 1500 to 2000 feet, what effect would that have on the average life of the particular tracks of the cat on the D8?

A. Will you repeat that question, please?

Q. Assuming the situation where a carryall is being operated with two tractors, one to pull and one to push, and assuming that that equipment is being operated in a circular fashion in ordinary soil conditions but the only exception to its use being that it is operated in a circular fashion around a circle having a diameter of some 200 feet, and then the loaded equipment being used under ordinary circumstances to haul the material away, ranging from 1500 to 2000 feet, what variance would there be in the average life of tracks on the [161] "Cat-erpillar" that you mentioned as approximating 4,000 operating hours in the normal wear and tear?

A. I don't know the difference in percentage of wear and tear. D8 tractors normally would not have power enough to load a W scraper in that kind of a turn.

Q. Ordinarily it would not be able to operate?

A. It would not be able to load the scraper to capacity. It would not have power enough.

Q. Would they be able to load it to any capacity?

A. Oh, yes.

Q. Well, they would be able to operate then on a limited basis?

A. That is right.

(Testimony of E. E. Byrne.)

Q. Assuming they could operate on that limited basis, that is, by taking a less load, what effect would that have, if any, on the average life of the tracks?

A. It would have a serious effect, because they are not built to work that way. Tractors are not built——

Q. Can you approximate to any degree what the effect might be?

A. I don't know what it would be in percentage. It would certainly cut the life down, because the tractors are not built to load a scraper on a turn.

Q. Would operating in that manner also have a substantial effect on the carryall equipment? [162]

A. It would have an effect on the whole outfit, all of the equipment.

Q. But you are not able to state what the extent of that would be?

A. No, I am not, because it would cause excessive wear on the tires and perhaps some breakage there on the tongue of the scraper or on the pusher block behind the scraper.

Q. In the damage or excessive wear that it might cause.

A. Not that I know of.

Q. Would it cause any excessive wear on the tracks, on the track assembly of the "Caterpillars"?

A. It would naturally cause excessive wear on the trucks, track, rollers and the complete assemblies.

(Testimony of E. E. Byrne.)

Q. Could you say or approximate how much?

A. No, I couldn't.

Mr. Wanger: That is all.

Redirect Examination

By Mr. Gentner:

Q. Mr. Byrne, you gave the cost of bulldozer at the factory. What is the cost of the bulldozer installed here at Portland?

A. It would be approximately \$1200.

Q. \$1200. And the four-drum power unit was also a factory price. What is the installed price here at Portland?

A. Approximately \$1350.00.

Q. Now in loading in a circular manner on very hardpan, cement- [163] like ground with one tractor pulling and one tractor pushing, would there be any racking of the frame of the carryall?

A. There would be because the pusher tractor would not be pushing straight on the rear of the carryall. It would be pushing the carryalls side-ways on the turn.

Q. Are these carryalls built for a side push in loading?

A. They are not.

Q. Now these carryalls have a blade for loading, do they not?

A. We call it the cutting edge.

Q. The cutting edge. And is that cutting edge designed to load large boulders and hardpan ground without the use of a rooter.

A. It is not.

(Testimony of E. E. Byrne.)

Q. What is this carryall designed for—to carry what type of—

A. It is not for carrying dirt and material that could be rooted up with a rooter so that the carryall can pick it up.

Q. Now if the tractor could be traveling in sandy mud and slush during the process of taking the load from the place where it is obtained to where it is dumped, and this mud and slush would be of a level sufficient to be up to the top of the tracks, what would be the effect of that on the track assembly? [164]

A. Well, there would be a large amount of excessive wear in the complete track assembly, also in the final drives of the machine.

Q. And how would that affect the final drives?

A. That type of material will eventually cut out the oils in the final drives, allow the oil to run out and of course the dirt to go in.

Q. That would destroy and ruin the final drive, would it? A. Yes, very easily.

Q. Approximately how much do the parts cost for track assembly on the D8—just the parts, not the labor? A. You mean the part complete?

Q. Yes; the track roll assembly.

A. Approximately \$1750.

Q. That is just for the parts? A. Yes.

Q. Would you know about what a final drive would cost, the entire assembly necessary?

(Testimony of E. E. Byrne.)

A. Approximately \$350, I believe, is the cost of a complete final drive.

Q. The labor of installing these tracks and final drives, as I understand it, is quite expensive, is it not? A. Yes.

Q. You don't have any figures on that, how-

Q. You don't have any figures on that, however, I assume?

A. Well, for installing that part of it it would probably [165] take 250 man hours.

Q. 250 man hours? A. Yes.

Q. Is that in the shop, or would that be out in the field? A. That is in the shop.

Q. And out in the field where the shop facilities are not available would that amount be increased?

A. Well, all labor or repairs made on a tractor on the job are much higher than they are in the shop.

Q. In other words, there is a difficulty, is there, that doesn't exist under shop conditions?

A. That is right.

Q. So that you would say that that amount would be increased considerably in the field?

A. Yes.

Mr. Gentner: That is all.

Mr. Wagner: That is all.

(Witness excused.)

Mr. Gentner: Mr. Cooley.

H. E. COOLEY

was thereupon produced as a witness in behalf of the defendants, and, having been first duly sworn, testified as follows: [166]

Direct Examination

By Mr. Gentner:

Q. Your name is H. E. Cooley?

A. That is right.

Q. And where do you reside, Mr. Cooley?

A. Seattle.

Q. By whom are you employed?

A. A. C. Goerig.

Q. During 1942 and 1943 by whom were you employed? A. A. C. Goerig.

Q. At what place on the job?

A. Kitsap County Airport, about 110 miles from Seattle.

Q. That was up at the same place the Kuckenberg equipment was being used?

A. That is right.

Q. What was your position on the job there?

A. I was foreman and took care of the equipment. I was overseer of the whole job.

Q. Now A. C. Goerig is a brother of A. J. Goerig, is he not? A. That is right.

Q. The gentleman who leased the Kuckenberg equipment? A. That is right.

Q. This job that you were on, as I understand it, was immediately next to the A. J. Goerig job?

A. Well, our job—we had the first there. There were two [167] jobs there and we had the first one,

(Testimony of H. E. Cooley.)

and it was a runway extension, and grading slopes, cutting slopes down, changing them. They were four-to-one and we changed them to seven-to-one slopes and all along the runway.

Q. Did you build any reventments?

A. No, we didn't have any revetments. We took out some that had already been built, is all.

Q. You were right on the same airport, right next to the A. J. Goerig job, weren't you?

A. Their job and our job ran together.

Q. Ran right together?

A. Ran practically the same. Well, the same material, except ours was a little bit different job, was all.

Q. Were you familiar with the conditions on the A. J. Goerig job?

A. Oh, yes. They were the same as ours.

Q. You were there during the time the Kuckenberg equipment was up there?

A. Oh, yes. We were there from the time they came. We were still there when they left.

Q. You were there before they came and after they left, as I understand it?

A. That is right.

Q. Now you saw these revetments being constructed by A. J. Goerig, did you not? [168]

A. Yes. I was there all the time.

Q. Now as I understand it, those started in about 200 feet in diameter, 100-foot radius, and worked down to about a 50-foot radius, did they?

A. Oh, about that on top. Then they were down

(Testimony of H. E. Cooley.)

to about 50 or 70 feet wide, I imagine. It has been quite a while, but, as I remember it, they were about that at the bottom.

Q. What were the weather conditions there in December and January and February on the job?

A. Well, we had quite a bit of rain and we had a little snow there that winter. In fact, we had about two feet of snow on the level there for a little while. It didn't last very long. And it made it quite a bit different when it did last.

Q. Did you see the Kuckenberg equipment when it came on the job there? A. Oh, yes.

Q. Was it in good condition?

A. Just like new, it looked to me, when it came in.

Q. Now what was the nature of the material that this equipment was about to work in?

A. Well, there is quite a bit of that kind of material. It is kind of a sand and gravel; kind of a cement gravel. What we call it up there is hardpan. But when it is dry, why, it is as good a material as there is to move, but when it gets [169] wet it kind of, oh, mushes all up like mush, and it is pretty hard to handle it when it is wet.

Q. You say it is sort of like cement when it is wet?

A. Well, it is just about like ready-mixed concrete when it is wet. You can lay it out in the sunshine and drain the water out and it seems to be all right.

(Testimony of H. E. Cooley.)

Q. Did you have any sunshine there in January, February and March?

A. Not much sunshine there then.

Q. Now this hardpan, what effect did that have on equipment, such as the scraper? What effect would that have?

A. Well, the scraper part of it, of course they are on rubber tires and it is hard on the digging bits. It wears them out pretty fast.

Q. On the bits?

A. But so far as the tires and the rest of them——

Q. Now you folks had—your company had put your tractors and carryalls up there, did it not?

A. We had some in.

Q. And did you use those?

A. Well, we did when it was dry, but we had shovels and trucks. We used a shovel and truck there, too, at the same time, but of course when the bad weather started we had to shut down the carryalls.

Q. You shut down the carryalls and tractors when the wet [170] weather came?

A. Yes. The only tractors we used were just the one necessary to keep the trucks busy.

Q. Why didn't you use your tractors and carryalls when the wet weather came?

A. Well, that was too expensive, for one thing, and then they didn't——

Q. What do you mean, too expensive? You mean it was bad on the equipment?

(Testimony of H. E. Cooley.)

A. Well, it was bad on the equipment, and then they wouldn't work, you see. All they did was just made a big mud pile and you could not do anything with it then.

Q. Now in your opinion—let me ask you, first, how long have you been in the construction business, Mr. Cooley? A. Oh, twenty years.

Q. Twenty years. In your opinion was it good construction practice to use tractors and carryalls in the construction of the revetments on the A. J. Goerig job during——

Mr. Wagner: I object, your Honor.

Mr. Gentner: Just a minute.

Q. ——during the period that they were up there, December, January, February, March and April?

Mr. Wagner: I wish to object to that. That is not within the issues of this case at all.

The Court: He may answer, subject to the objection. Go [171] head.

A. No. That wasn't a tractor job; that was a shovel job. In fact, we did that same job and figured on using a truck and shovel on that. It was an ideal shovel and truck job, was what it was.

Q. It was a job for shovel and truck?

A. That is what it was.

Q. But not for a tractor and scraper?

A. It was an ideal truck job for the weather conditions, and so on, although it wasn't a fine tractor job even for the summertime. The area wasn't big enough to operate that big equipment.

(Testimony of H. E. Cooley.)

Q. Did you see the loading proceeding in a circular manner in these revetments?

A. Oh, yes. We were very much interested in watching that, as a matter of fact, to see how it worked.

Q. In your opinion did that circular loading cause unusual wear and tear of the equipment?

A. Oh, yes. That loading—well, you have the line—you only have about half the lines to fill in your truck. Loading around curves anyway you have to throw one truck out, and you do that and it throws all the power of the motor on one side.

Q. And wears that one side?

A. And wears that one side. And they don't load very good, [172] either.

Q. They are built for straight loading ahead, are they not?

A. That is where they are most efficient. That is right.

Mr. Gentner: I think that is all.

Cross Examination

By Mr. Wagner:

Q. You indicated that when this soil up there or this material that was being moved was dry it was easy to move; is that right?

A. No, it is not easy to move. It is bad. That hardpan is hard stuff. I guess it is all right if you have a rooter and good enough power on the rooter to root it up, then it is not too bad, but—

Q. Did you see the rooter in operation up there?

(Testimony of H. E. Cooley.)

A. Well, some of the time I noticed they had a rooter but of course they had a little trouble with keeping the teeth.

Q. A little trouble with keeping the teeth?

A. Well, the teeth would not last very long. Then of course they would run out of teeth and they would try to work the rooter.

Q. Is that actually what happened?

A. Well, I would not say, but I know we had that same trouble. We had practically the same kind of work and sometime your teeth only would last about an hour and of course if the mechanics are not right handy they will keep on working and——

[173]

Q. This material indicated it was hard on the digging business but didn't affect the tires; is that right?

A. Well, not in working. It doesn't affect the tires, so far as the harpan is concerned, but of course in loading the way they load them——

Q. The soil conditions are very much the same all over the entire working—all over the entire airport up there?

A. Oh, no. They had some pretty fair dirt up at the other end. They had some hard and they had some that wasn't too hard.

Q. Some revetments up there, too?

A. They had some, a few up there on that end of the field, too.

(Testimony of H. E. Cooley.)

Q. Do you recall how many revetments were on the entire job? A. All told?

Q. Yes.

A. Well, let's see. There were about six or seven I think on that side of the taxi way 6, and then on the other end I imagine about five, four or five. I could not say offhand.

Q. Four or five on the other end, and, on the other end you referred to the same part of the airport that you said was pretty good working?

A. Well, some of it was pretty good, but then some of it was hard up there, too. But practically all your airport was similar—that same material.

[174]

Q. About how far did this equipment of Mr. Kuckenberg's have to travel to dispose of this material?

A. Well, let's see. Oh, I think they ran between a thousand and two thousand or twenty-five hundred feet, I think, they hauled some of that stuff.

Q. That was from the other end?

A. Well, they crossed the runway. They built—they put some dirt on the runway and put plank on it and then crossed the runway over to the west area. They came out of these revetments, come up and across and over into the west area there. Then some of it they took off behind, back in the lower part of the work—anywhere to get rid of it. That was the main thing.

Q. Some of it went up about 2500 feet there?

(Testimony of H. E. Cooley.)

A. I would say some of it was hauled as much as 2500 feet. When they would get it up in one place they would try to work someplace to keep working and try to get just the same drainage here and fix it up again.

Q. Can you describe what the size of the average gravel was that was included in this so-called hardpan? A. The size of the gravel?

Q. Yes. Can you describe that?

A. Well, it would run—well, that harpan runs anyway from nothing to an inch, inch and a half, 2-inch stuff. Then sometimes you would get some boulders in it. They had some few [175] big boulders to handle. In fact, we had some in our work right next to them where we had to shoot them. We could not get anything to pick them up with. We had to shoot them.

Q. Would you say most of that was average size gravel?

A. Well, I would say that was hardpan. It runs up from nothing, up to two or three-inch stuff.

Q. Well, generally speaking was it gravel or would you say it was sand, or was it part gravel and part sand?

A. Well, to us fellows it is just hardpan. I don't know just what you would call it.

Q. Is there any sand in it at all, or was it mud?

A. Well, it is sand and gravel, and kind of like cement gravel. Of course, cement gravel does not get as hard in the bank. I have had a little experience with cement gravel. It doesn't get that hard in

(Testimony of H. E. Cooley.)

the bank, but when the water touches it it just seems to mush all up. Then when the water gets out of it again it will tighten back up again.

Q. This gravel is not actually rock?

A. Well, no, I wouldn't call it rock.

Q. It is kind of hard mud, isn't it?

A. Well, no. It is rock. It is kind of—it is gravel all right, sand and gravel. A mixture is what it is, some kind of a glacial formation, I guess. I don't know what you would call it.

Q. Did Mr. Kuckenberg ever have any shovels up there on the [176] job, that you know of?

A. No, no shovel. I don't remember he had a shovel. All he had was cats and scrapers, if I remember right. Oh, he had some service trucks, and shop cars, and stuff like that.

Q. But to your knowledge he didn't have any shovels on the job up there at all?

A. No shovels.

Q. No shovels and trucks?

A. No. In fact, we finished their job with our trucks. We let them have them after we got through with them, and they finished with trucks and shovels.

Mr. Wagner: That is all.

Redirect Examination

By Mr. Gentner:

Q. These revetments you mentioned at the further end of the field that you said were easier soil, were they part of this A. J. Goerig job?

(Testimony of H. E. Cooley.)

A. Yes. You see, they had taxi ways and revetments, and our job——

Q. All of the revetments?

A. They took all of the revetments and taxi ways, and our job was runways and slope excavation to allow for the slopes.

Q. How many revetments did A. J. Goerig have?

A. Well, I would say they must have had ten or eleven.

Q. Ten or eleven? [177]

A. Yes, that is all.

Q. They didn't do all of them with this Kuckenberg equipment, did they?

A. No. Kuckenberg's rigs I think all worked in that one bunch there.

Q. Where there was hard soil?

A. Yes, all through that one.

Q. All right.

A. In fact, I am sure they did. I never saw any of them up at the other end.

Mr. Gentner: All right. Thanks very much.

(Witness excused.)

LEE H. GORDON

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows:

(Testimony of Lee H. Gordon.)

By Mr. Gentner:

Q. Your name is Lee Gordon? A. Right.

Q. And your residence is Portland?

A. Milwaukie; yes.

Q. Milwaukie, Oregon. You are not employed by Kuckenberg Construction Company at the present time, are you? A. No, I am not. [178]

Q. You are in business for yourself, as I understand it? A. That is right.

Q. Now in the year 1942 and '43 you were employed by Kuckenberg Construction Company, were you? A. That is right.

Q. In what capacity? A. Superintendent.

Q. And how many years experience have you had in construction work, Mr. Gordon?

A. Oh, about fifteen.

Q. And how many years had you been with Kuckenberg? A. I think four.

Q. And who else had you worked for before that time? A. Tavares Construction Company.

Q. That was heavy construction, was it?

A. Heavy construction.

Q. Who else?

A. Raymond Concrete Pile Company; Quinton Construction Company.

Q. In what capacity were you with them?

A. Superintendent for Tavares Construction Company; engineer for Raymond Pile.

Q. And who else did you work for?

A. Quinten Construction Company.

(Testimony of Lee H. Gordon.)

Q. Now did you go up on this Goerig job when the equipment was sent up there? [179]

A. No. I went up shortly after it was sent up.

Q. About how long afterwards?

A. Oh, when they first started having trouble, about two weeks.

Q. And what condition did you find there, Mr. Gordon?

A. Oh, I found that it is the same condition that has been described before here. It is just a cement gravel that was not being left, or not being loosened so that the cats and carryalls could operate with any degree of efficiency.

Q. At that time there was no rooter up there, as I understand it?

A. There was no ripper there at all, no.

Q. And this ground, you say, this soil condition, you say, has been described by Mr. Cooley?

A. That is right.

Q. That is the way you found it?

A. That is right.

Q. And in addition to that what were the conditions as to water?

A. Well, the ground, before it is loosened, is very hard. It is a hardpan.

Q. I mean, was there much water? Were there any springs on this job?

A. Oh, yes. All of their cuts seem to have springs in them and the water would run down through the cuts and no attempt [180] was made whatsoever to take care of draining on their cuts.

Q. Then what became of this water?

(Testimony of Lee H. Gordon.)

A. Well, it would run right down their haul roads, and it would mix up with the sand and the gravel that would spill from the scrapers and be just left a slush there all the way from six inches to a foot or a foot and a half deep and the cats were wallowing through it at all times.

Q. Now could that have been controlled?

A. Yes, it could. We controlled it there at our expense part of the time.

Q. How high—would this get up as far as the tops of the rollers on the cats?

A. Yes, it did, and over the top of the rollers.

Q. And even over the top?

A. Yes, it did.

Q. What effect did that have on the cats?

A. Well, that material was just an abrasive, was just what it amounted to—just like cement and sand mixed together—a very abrasive material.

Q. Wore them right down, eh?

A. Just wore them out completely.

Q. Did it affect their final drives?

A. Yes, it did. It would go through their seals and the sand would get into the oil and take the bearing and the gears out of them. [181]

Q. Well now, what was this doing to the—let me ask you again, before I get on to that, what was the condition of this equipment when it went up there?

A. It was all in good condition. I would say by that—

Q. Some of it new, was it?

(Testimony of Lee H. Gordon.)

A. Well, there was one cat and one carryall that was practically new. I don't believe it was run but very little at Spokane, and all the rest of it——

Q. All of the rest of it was in good shape?

A. Was good.

Q. What operation was being used by Goerig? Was he loading in a circle, or what?

A. Well, he was loading in a circle.

Q. And what effect was this having on the equipment?

A. Well, it jackknifes the scraper. That was between the two cats, one pulling and one pushing on it, and it has a jackknife effect on it, and the push cut behind in loading on that circle is pushing right into one of the tires, as a rule.

Q. And what did that do to the tire?

A. It blows the tires—cuts them up and blows them out, for one thing.

Q. What did it do on the carryalls? What effect did it have on the cables?

A. Well, I know it broke one arch up there, and the arch pin [182] is about nine inches in diameter, steel, and this is the first time I have ever seen one of those pins broken and it broke one of those pins up there, and broke the drawbars out of the cats and wrecked the scrapers.

Q. And did it do anything to the frames of the tractors?

A. Oh, the track frames themselves, pushing on the side just—well, they can't last very long that way. They just—it just tears them to pieces.

(Testimony of Lee H. Gordon.)

Q. Were any cables cut?

A. Well, loading without a ripper was harder on the cables than the actual loading in a circle.

Q. What did you do? What effect was this having on the equipment? I will ask you that.

A. Well, we had, when we got up there there was a couple of cats broken down and some of the scrapers were out of use, and we hired all the men we could get around there, our spare cat skimmers and our mechanics were there, and tried to get it back in shape.

Q. How many men did you have at work there?

A. Oh, we had two grease men and two cat skimmers, and myself, were working on the cats there, right away there. There were five of us.

Q. How many mechanics?

A. And one mechanic. That was it.

Q. Did you get any mechanics from Portland?

[183]

A. Yes, we did. We brought up three from Portland.

Q. Under ordinary conditions what kind of a crew would you need to keep that equipment in shape?

A. One mechanic working eight hours a day should be ample to keep that in condition and shape, and in good shape.

Q. And what did you do then?

A. Well, we tried to keep it going there. We took the whole fleet one afternoon and built haul roads under Kuckenberg's expense and cleaned up

(Testimony of Lee H. Gordon.)

this slush or slop, as we called it there, on the roads and cleaned them up so they could operate without breaking up the equipment, and then we started them up again the following morning.

Q. What did you finally do? Did you shut this job down?

A. I finally had to shut it down.

Q. And that was January 4th, was it?

A. I think it was January 4th.

Q. And why did you shut it down?

A. Well, we shut it down because we could not keep the equipment up. Even with this gang of mechanics and everybody we could have work on the equipment we couldn't keep it in shape, and as fast as we would send it out they would break it up and they insisted on loading in that circle and we would go out and make our complaints to their supervision out there and they would load in a straight line for a while, perhaps for an hour or two until our backs were turned, and [184] then they would be loading in a circle again, and no ripper, and we just couldn't operate. We couldn't keep the equipment in shape to keep going.

Q. Now if they had loaded they could have loaded in a straight line, could they not?

A. Yes, they could have.

Q. They could have used a ripper?

A. That is right.

Q. That would have eliminated a great portion of this unusual wear?

A. Well, it would have eliminated some of it,

(Testimony of Lee H. Gordon.)

yes, but the ground was so hard they still would have had trouble.

Q. It still was unsuitable? A. Yes.

Q. Would you say this was a job that was suitable for carryall operation?

A. Absolutely not.

Q. It would require shovels and trucks, would it? A. Uh huh. That is right.

Q. After the job started up again later on, you from time to time supervised it, did you, throughout the completion of the job? Is that it?

A. That is right.

Mr. Gentner: That is all.

Mr. Wagner: No cross examination.

(Witness excused.)

[185]

GORDON GIEBISCH

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gentner:

Q. Your name is Gordon Giebisch?

A. That is right.

Q. And you reside in Portland?

A. Yes, sir.

Q. How long have you been in construction work?

A. Oh, pretty near since I was a baby, twenty or thirty years.

(Testimony of Gordon Giebisch.)

Q. And you were on this Goerig Job up near Bremerton, were you not?

A. That is right.

Q. You went up there I believe in about the 10th of January, did you?

A. Right about in there, yes.

Q. And you acted in what capacity? As foreman the rest of the time?

A. Yes, that is right.

Q. For Kuckenberg? A. Yes, sir.

Q. And what were you supposed to do up there?

A. I was there to watch the equipment and keep it in repair, see that it was fixed and see that it was operated to as much [186] advantage as possible to Kuckenberg.

Q. Now did Goerig cooperate with you in trying to eliminate excessive or unusual wear and tear of this equipment? A. Well, not very well.

Q. Well, what do you mean by that?

A. Well, it was the matter of rooting up that hard ground in order to make things easier for the cats that should have been done, but as it required an extra equipment for them they didn't seem to want to do that.

Q. So they refused to use a rooter?

A. Well, they did until toward the latter part of the job. Finally we got them so they would use one a little bit, but before that it was just like pulling teeth to ever get them to put one in there.

Q. And did they use it properly and sufficiently after they did get one?

(Testimony of Gordon Giebisch.)

A. Well, not altogether, no, because they were shy of parts when the rooter teeth wore out very quickly and they didn't have enough supply for the teeth to keep it rooted even then as it should have been.

Q. What was the condition of the water there on the haul way and the mud where you were hauling from the revetment out to the dumping place?

A. The condition of the water?

Q. The mud and slush? [187]

A. The water was allowed to run out of these revetments down into the haul road where the cats had to go through this all the time and the material was—it consisted of the gravel and sand that was mixed up with the water most of the time, which made an abrasive agent there just like a sandpaper, and the cats, the tracks were in that and were covered with it most of the time that we were running in there.

Q. It was deep enough so that it covered the entire tracks, did it?

A. That is right. In one place where we were loading there out of one pit the muck there was up to the top of those tracks.

Q. Now did you attempt to get Goarig to load in a straight line there? A. Yes, I did.

Q. And did he do it?

A. He did it a little bit while I was there, but when I come back, why, he was loading around again in a circle.

(Testimony of Gordon Giebisch.)

Q. It was possible to load in a straight line, was it not? A. Yes, it could have been done.

Q. Were there any boulders on this or in this ground?

A. Yes, there were. And in loading around the circle and striking those boulders was the thing that caused a lot of the trouble with those cats, and under normal operation with loading with a cat and carryall the cat and carryall is [188] supposed to be going in a straight line and ordinarily when the push cat comes up behind the cat and carryall for loading they go along in a fairly smooth sort of a way until that carryall is loaded and goes to get away from there, and the moment you start loading around that circle you lose the power in your cats and the first thing that happens is your operators, they get to fighting with both cats, both your pushing cat and your pulling cat; that is, fight clutches, and so forth, and they are trying to load around in a circle, using these levers and things, and that is all the stuff that wrecks the cats and carryall both.

Q. In other words, dragging back and forth?

A. Dragging, and just finally fighting that way with the cats to try to get a load in it.

Q. What about these boulders? Was this carryall proper equipment to get for this?

A. No; none—not unless it is rooted out; at least a bulldozer to bulldoze them out or a rooter to kick that out, one or the other, which they could be picked up in less time.

(Testimony of Gordon Giebisch.)

Q. When that wasn't done what was the effect on the equipment?

A. When I hit one of those boulders—now when you are going along in hardpan it stops everything. You have got your cats standing there. The first thing you know your bits are gone out of your carryall. It all causes breakage.

Q. Now was there much breakage of bits or blades on the [189] carryalls?

A. Yes, there was.

Q. What effect did all of this operation have on the equipment?

A. What do you mean, what effect?

Q. Well, what did it do to the equipment?

A. It wrecked it.

Q. Was this in your opinion a proper job for carryalls and cats loading?

A. I would say not, no.

Mr. Gentner: You may examine.

Cross Examination

By Mr. Wagner:

Q. What do you mean, Mr. Giebisch, when you say that it was possible to load in a straight line but that Goerig refused to do it? Will you explain that a little bit for us.

A. Well, by loading in a straight line they would have had to have the planer go in there with the bulldozer to cut the curve out and throw that dirt out so the cats would pick it up and as they laid it there across the dam. That was extra work

(Testimony of Gordon Giebisch.)

for them naturally because it took an extra task to get that, and there we brought it from the curve out to where it could be loaded in a straight line.

Q. But it could have been done very easily?

A. It could have been done.

Q. And what did you say your job was up there? [190]

A. My job was taking care of the cats and carryalls to see that the repairs were made and to keep the cat operators, and so forth. We furnished operators.

Q. You say you were foreman?

A. For Kuckenberg, yes. In other words, I didn't have any say over other operations.

Q. You didn't have any say over the operations of the company at all?

A. Not the actual doing of the work, outside of arguing with them about it.

Q. In your opinion it is a fact that there could have been straight line loading? A. Yes.

Q. And in your opinion would that have caused any extraordinary wear or breakage on the machinery?

A. Well, I think that the material itself would have, anyway; yes.

Q. The material itself would?

A. The hardpan—in other words, they are not made for loading of hardpan, unless it is rooted up and softened up in some way beforehand, on any cat and carryall operation.

(Testimony of Gordon Giebisch.)

Mr. Wagner: That is all.

Mr. Gentner: That is all.

(Witness excused.)

[191]

CHARLES H. MILLER

was thereupon produced as a witness in behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gentner:

Q. Your name is Charles H. Miller?

A. Yes, sir.

Q. And your office is in the Wilcox Building, is it? A. 801 Wilcox Building.

Q. You were for some time connected with the OPA, were you not? A. For sixteen months.

Q. Just speak a little louder. And could you kindly tell the Court in what capacities you were employed by the OPA?

A. Well, as I started in in the Investigation Section as Chief Inspector, transferred over to the Price Division when the Investigation Section arrangement was changed, and became Price Specialist, and eventually the Chief of the Industrial Materials and Equipment Section. That means that our job was to explain the regulations concerning machinery and machine tools, iron and steel and all types of the heavy industrial equipment to anyone

(Testimony of Charles H. Miller.)

inquiring in that field. We would give them the regulation, help them understand the clauses therein, or give them any of the interpretations that came out either from the National or the Regional Office; [192] in other words, a Price Administrator job.

Q. During what period of time were you there? What was the last title you had there?

A. Chief of the Industrial Materials and Equipment Section.

Q. What period of time did you occupy that position?

A. From about January, 1943, to August 31st.

Q. 1943? A. Yes.

Q. At that time you resigned, did you?

A. Yes, sir; in August.

Q. Now Mr. Miller, with reference to—could you give him this Pre-Trial Exhibit 21.

(Pre-Trial Exhibit 21 was passed to the witness by the Clerk.)

Q. Before I ask you this question, Mr. Miller, was it a part of your duties to figure rates under Regulation 134?

A. My chief work was figuring the schedules under 134 and 136, and to assist those who wanted help, came in for help or asked for help to figure out their rentals under these regulations, yes.

Q. And you are thoroughly familiar with the method of figuring rates and prices under Regulation 134, are you? A. I am.

Q. Did you make a computation—

(Testimony of Charles H. Miller.)

Mr. Wagner: Just a minute. If the Court please, I want [193] to ask counsel if the qualification is for the purpose of establishing Mr. Miller as an expert witness?

Mr. Gentner: Yes.

Mr. Wagner: Is that it? And an expert in what capacity?

A. An expert for computing rates and prices under Regulation 134.

Mr. Wagner: And Mr. Miller is being employed, is he, as an expert in this case?

Mr. Gentner: Yes, he is.

Mr. Wagner: Well, I wish to object generally, your Honor, and more specifically, to the introduction of any evidence and any testimony by Mr. Miller as not being relevant, competent or material; and, further, that the matter of the production of sheets and the matter of the figures involved in this case are not the subject of any—should not be the subject of any expert testimony. We have the figures and we have the Regulation, and that any interpretations that may be forthcoming are matters for the Court and not for an expert.

The Court: I will hear the witness.

Mr. Gentner: Q. Mr. Miller, you testified you are thoroughly familiar with the method of computing rates under 134? A. Yes, I am.

Q. Did you make a computation of the maximum prices under [194] Regulation 134, covering the Goerig operations, Goerig rentals by Kuckenberg Construction Company?

(Testimony of Charles H. Miller.)

A. Yes, I did.

Q. And what is the number of that exhibit you have?

A. The number of the exhibit is Exhibit 21.

Q. Referring to Exhibit 21, is that your computation?

A. This is my computation on the A. J. Goerig Construction Company rental with Kuckenberg—between Mr. Kuckenberg and A. J. Goerig Construction Company.

Q. What is that computation?

A. It is an application of a schedule of rates in Regulation 134, plus the part of operating and maintenance service rates by the Office of Price Administration to the possession time of the equipment account, operating time of the equipment of the employees that worked with the equipment, so that Mr. Kuckenberg could know what the maximum OPA price was, according to Regulation 134, at the time.

Q. Did you also make any computation of the Buckler and Lease & Leigland jobs?

A. I did.

Mr. Gentner: I might say, your Honor, at the time at pre-trial I didn't know that Mr. Wagner would confine himself to five pieces of equipment only on the Buckler, and the computation that was offered here covered all equipment that was rented to the Bucklers and not just the graders [195] that are the subject of this suit, and so I have had Mr.

(Testimony of Charles H. Miller.)

Miller prepare a new computation covering only the graders, which are the only pieces of equipment that the plaintiff is proceeding on—of course, which we didn't know until after this had been prepared; and so I would like permission to offer this. This is offered but objections are made to its introduction. I would like to withdraw the Buckler portion of it as all of the equipment and substitute a computation for only the graders, which is all that Mr. Wagner has put in, and if you would kindly, I guess, mark this. Have the Reporter mark this 22, and I will have Lease & Leigland marked. I think probably you could mark this 22-A and 22-B. They are both 22. This is the other portion on these. Or would the Court Reporter mark them both 22.

(Thereupon the statement dated November 13, 1944, Kuckenberg Construction Company, sold to George H. Buckler, Contractor, etc., was marked Defendants' Exhibit 22-A; and the statement of Kuckenberg Construction Co., sold to Lease & Leigland, Contractors & Builders, at Portland and Toledo, Oregon, so offered, was marked Defendants' Exhibit 22-B.)

(Testimony of Charles H. Miller.)

DEFENDANT'S EXHIBIT No. 22-A

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, Oregon

Phone: TRinity 0407 11104 N. E. Holman St.

Date November 13, 1944

Sold To George H. Buckler, Contractor
 George H. Buckler Company
 The Buckler Corporation, Builders
 Portland, Oregon & Vancouver, Washington

Ship To	Your Number
Terms: Net Cash	Our Order

1943 Kuckenberg - Buckler Rental

SUMMARY STATEMENT OF RENTALS FOR
SIX MOTOR GRADER UNITS

#600, 601, 603, 604, 605, 606

Total Hours Worked by Graders.....	3,280½ hours
Total Billing by Kuckenberg Construction Co.	\$ 27,306.43
Total Ceiling Price Based on OPA Reg. 134 for Bare Rental and approved Operating & Maintenance Rates by OPA letter Feb. 5, 1943 (\$3.50 per hr.)....	\$ 27,218.20
Total Ceiling Price Based on Portland Competitors OPA Rates of Feb. & March 1943 (\$4.40 per hr.)..	\$ 30,170.65
Total Ceiling Price Based on OPA Letter of May 24, 1944 to Kuckenberg Construction Co. (\$3.55 and \$3.75 per hr.)	\$ 27,576.13

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

MOTOR GRADER UNITS

K—#600 Austin Western—99M—Diesel—All Wheel Drive
& Steer—11 Ton—Serial DS-1872

K—#601 Austin Western—etc.—Serial DS-2662

K—#605 Austin Western—etc.—Serial DS-3386

K—#606 Austin Western—etc.—Serial DS-3396

OPA Equipment Rental Rate	Month	Week	Day
Grader, Self Propelled, Diesel Pneumatic Tired, All Wheel Drive & Steer	\$580.00	\$193.00	\$48.00
Scarifier, Heavy	35.00	12.00	3.00
Generator, Electric (Lights).....	15.00	5.00	1.50
Total Equipment Rental.....	\$630.00	\$210.00	\$52.50

OPA Approved Operating and Maintenance Service
Rate \$3.50 per hr.K—603 Caterpillar Diesel Road Patrol #12—
Serial 9K4154SP—Buckler #189K—604 Caterpillar Diesel Road Patrol #12—
Serial 9K4751SP—Buckler #174

OPA Equipment Rental Rate	Month	Week	Day
Grader, Self Propelled, Diesel Pneumatic Tired, Extra Heavy Duty....	\$525.00	\$173.00	\$42.00
Scarifier, Heavy	35.00	12.00	3.00
Generator, Electric (Lights).....	15.00	5.00	1.50
Total Equipment Rental.....	\$575.00	\$190.00	\$46.50

OPA Approved Operating and Maintenance Service
Rate \$3.50 per hr.

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#600 Motor Grader—Austin Western—99M—Diesel
All Wheel Drive and Steer—11 Ton—Serial DS-1872,
Buckler #173

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$630.00	\$210.00	\$52.50

OPA Approved Operating & Maintenance Service
Rate \$3.50 per hr. (2/5/43)

OPA Equipment Rental for March—9 days—9/30 of \$630	\$ 189.00
29½ Hrs. O & M Charges @ \$3.50 per hr.....	103.25
3 Hrs. Operators Overtime and Insurance.....	2.88
OPA Equipment Rental for April 1943.....	630.00
114 Hrs. O & M Charges @ \$3.50 per hr.....	399.00
34 Hrs. Operators Overtime and Insurance.....	32.64
OPA Equipment Rental for May 1943.....	630.00
174½ Hrs. O & M Charges @ \$3.50 per hr.....	610.75
78½ Hrs. Operators Overtime and Insurance.....	75.36
OPA Equipment Rental for June 1943.....	630.00
160½ Hrs. O & M Charges @ \$3.50 per hr.....	561.75
48 Hrs. Operators Overtime and Insurance.....	46.08
6 Hrs. Operators Showup Time	11.17
OPA Equipment Rental for July 1943.....	630.00
222½ Hrs. O & M Charges @ \$3.50 per hr.....	778.75
70½ Hrs. Operators Overtime and Insurance.....	67.68
Cartage—Portland Area—2 Ways	31.00
Allocation for supervision—129 Days	584.37
Grader K—#600—Total OPA Maximum Rental.....	\$6,013.68

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#601 Motor Grader—Austin Western—99M—Diesel
All Wheel Drive and Steer—11 Ton—Serial DS-2662,
Buckler #101

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$630.00	\$210.00	\$52.50

OPA Approved Operating & Maintenance Service
Rate \$3.50 per hr. (2/5/43)

16 Hrs. Operators Overtime—Nov. 1942 @ 96c.....	\$ 15.36
OPA Equipment Rental for January 1943.....	630.00
201½ Hrs. O & M Charges @ \$3.50 per hr.....	705.25
87 Hrs. Operators Overtime and Insurance.....	83.52
OPA Equipment Rental for February 1943.....	630.00
236 Hrs. O & M Charges @ \$3.50.....	826.00
70 Hrs. Operators Overtime and Insurance.....	67.20
OPA Equipment Rental for March 1943.....	630.00
185½ Hrs. O & M Charges @ \$3.50 per hr.....	649.25
59 Hrs. Operators Overtime and Insurance.....	56.64
OPA Equipment Rental for April—3 Days	63.00
3/30 of 630—3 x \$21.00	
4½ Hrs. O & M Charges @ \$3.50 per hr.....	15.75
4½ Hrs. Operators Overtime and Insurance.....	4.32
Cartage—Vancouver Area—2 Ways	52.00
Allocation for supervision—93 Days	421.29
Grader K—#601—Total OPA Maximum Rental.....	\$4,849.58

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENGER - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#603 Motor Grader, Serial #9K4154-SP, Buckler
 #189—Caterpillar Diesel Road Patrol #12—With
 Scarifier and Lights or Generator

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$575.00	\$190.00	\$46.50

OPA Approved Operating & Maintenance Service
 Rate \$3.50 per hr.

OPA Equipment Rental—April—9 Days, 9/30 of \$575	
—\$19.166 x 9 days	\$ 172.49
74 Hrs. O & M Charges @ \$3.50 per hr.....	259.00
18 Hrs. Operators Overtime and Insurance.....	17.28

OPA Equipment Rental—May—240 hrs.	575.00
7 Hrs. Equipment Rental over 240 hrs. @ 1/480 of	
\$575—\$1.1979 x 7 hrs.	8.39
247 Hrs. O & M Charges @ \$3.50 per hr.....	864.50
62½ Hrs. Operators Overtime and Insurance.....	83.52

OPA Equipment Rental for June—22 Days—22/30 of	
\$575—\$19.166 x 22	421.65
138 Hrs. O & M Charges @ \$3.50 per hr.....	483.00
35 Hrs. Operators Overtime and Insurance.....	33.60
6 Hrs. Operators Showup Time and Insurance.....	11.17
Cartage—Portland Area—2 Ways	31.00
Allocation for supervision—61 Days	276.33

Grader K—#603—Total OPA Maximum Rental.....\$3,236.93

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail Billing by OPA Maximums

K—#604 Motor Grader, Serial #9K4751-SP, Buckler
 #174—Caterpillar Diesel Road Patrol #12—With
 Scarifier and Lights or Generator

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$575.00	\$190.00	\$46.50

OPA Approved Operating & Maintenance Service
 Rate \$3.50 per hr.

OPA Equipment Rental for January 1943.....	\$ 575.00
146½ Hrs. O & M Charges @ \$3.50 per hr.....	512.75
39½ Hrs. Operators Overtime and Insurance.....	37.92
OPA Equipment Rental for February 1943	575.00
134½ Hrs. O & M Charges @ \$3.50 per hr.....	470.75
26 Hrs. Operators Overtime and Insurance.....	24.96
OPA Equipment Rental for March 1943.....	575.00
69½ Hrs. O & M Charges @ \$3.50 per hr.....	243.25
29½ Hrs. Operators Overtime and Insurance.....	27.96
OPA Equipment Rental for April 1943—21 Days—	
21/30 of \$575—\$19.166 x 21 Days.....	402.49
160 Hrs. O & M Charges @ \$3.50 per hr.....	560.00
56 Hrs. Operators Overtime & Insurance.....	52.13
Cartage—Vancouver Area—2 Ways	52.00
Allocation for supervision—111 Days	502.83
Grader K—#604—Total OPA Maximum Rental.....	\$4,612.04

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#605 Motor Grader—Austin Western—99M—Diesel—
All Wheel Drive and Steer—11 Ton—Serial 3386,
Buckler #102

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$630.00	\$210.00	\$52.50

OPA Approved Operating & Maintenance Service
Rate \$3.50 per hr. (2/5/43)

18½ Hrs. Operators Overtime Nov. 11 & 26, Dec. 8 & 9, 1942 @ 96c	\$ 17.76
OPA Equipment Rental—Jan. 1 to 31, 1943.....	630.00
237½ Hrs. O & M Charges @ \$3.50 per hr.—January	831.25
87½ Hrs. Operators Overtime and Insurance—Jan.	84.00
OPA Equipment Rental—February—In possession of Lessee	630.00
OPA Equipment Rental—March 1 to 15, 1943—15/30 of \$630	315.00
92 Hrs. O & M Charges @ \$3.50 per hour—March....	322.00
23 Hrs. Operators Overtime and Insurance—March	22.08
Cartage—Vancouver Area—2 Ways.....	52.00
Allocation for supervision—75 Days	339.75
Grader K—#605—Total OPA Maximum Rental.....	\$3,243.84

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-A—(Continued)

KUCKENBERG CONSTRUCTION Co.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

1943 KUCKENBERG - BUCKLER RENTAL

Detail of Billing by OPA Maximums

K—#606 Motor Grader—Austin Western—99M—Diesel—
All Wheel Drive and Steer—11 Ton—Serial 3396

OPA Equipment Rental,	Month	Week	Day
Regulation 134	\$630.00	\$210.00	\$52.50
OPA Approved Operating & Maintenance Service			
Rate \$3.50 per hr. (2/5/43)			

OPA Equipment Rental for February 1943.....	\$ 630.00
220¼ Hrs. O & M Charges @ \$3.50—February.....	770.88
70 Hrs. Operators Overtime and Insurance—Feb.....	67.20
OPA Equipment Rental for March 1943—240 Hrs.....	630.00
43¼ Hrs. Equipment Rental over 240 Hrs. @ 1/480 of 630, per Hr.—\$1.3125.....	56.77
283¼ Hrs. O & M Charges for March @ \$3.50.....	991.38
78½ Hrs. Operators Overtime and Insurance—March	75.36
OPA Equipment Rental for April 1943.....	630.00
107 Hrs. O & M Charges @ \$3.50 for April.....	374.50
36 Hrs. Operators Overtime and Insurance—April....	34.56
OPA Equipment Rental for May 1/2 Mo.—15/30 of \$630.00	315.00
42½ Hrs. O & M Charges @ \$3.50 for May.....	148.75
10½ Hrs. Operators Overtime and Insurance—May	10.08
Cartage—Vancouver Area—2 Ways	52.00
Allocation for supervision—105 Days.....	475.65
Grader K—#606—Total OPA Maximum Rental.....	\$5,262.13

(Testimony of Charles H. Miller.)

DEFENDANT'S EXHIBIT No. 22-B

Address All Mail: Route 7 - Box 949

KUCKENBERG CONSTRUCTION CO.

General Contractors

Portland, 16, Oregon

Phone WEBster 2259 11104 N. E. Holman St.

Date May to December 1943

Sold To Lease & Leigland, Contractors & Builders
At Portland and Toledo, Oregon

Ship To

Your Number

Terms: Net Cash

Our Order

SUMMARY COMPARISON

Of Actual Billing With OPA Maximum Rentals

Units Rented	Possession	Hours	As Billed	OPA Max.
#601 Motor Grader	5/1 to 11/2	815 Hrs.	\$ 5,420.91	\$ 5,601.66
#605 Motor Grader	10/5 to 10/13	8 Hrs.	67.20	451.20
10-Ton Roller, Gas, 3 Wheel	10/5 to 11/18	40 Hrs.	274.44	462.44
#99M Patrol Grader	10/14 to 12/22	190½ Hrs.	1,524.00	2,094.75
#410 Cat. & Carryall	10/16 to 11/9	42 Hrs.	487.20	1,851.55
#410 Cat. & Dozer	11/9 to 12/23	342 Hrs.	3,106.81	3,113.10
#415 Cat. & Dozer	10/26 to 11/9	13 Hrs.	118.17	835.90

Aggregate Totals.....	\$10,998.73	\$14,410.60
-----------------------	-------------	-------------

Not In Excess of OPA Maximums

The aggregate rental billed and/or paid is \$3,411.87 less than the OPA Maximum billing. In some instances the lessee paid the wages of the operator, and other operating charges.

Comparisons of actual billing and OPA Maximum billing have taken this into account in each instance. Furthermore, each individual machine unit has been billed and/or paid at a figure less than the OPA Maximum.

To the best of our knowledge and belief the rentals charged to Lease and Leigland on these rentals are not in excess of the OPA permitted maximums, either individually by machines or in the aggregate.

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

KUCKENBERG CONSTRUCTION CO.

General Contractors

11104 Northeast Holman Street

Portland, Oregon

Lease & Leighland

N. W. 35th & Yeon St.

Portland, Oregon

CORRECTED SUMMARY†

Rental of #601† Motor Grader—Austin Western M-99 w/Heavy
Scarifier & Generator for Lights

As Billed

Inv. 6/10—(CB #35) May 1 to 31—	
211½ Hrs. @ 6.40*	\$1,353.60
Inv. 7/23—(CB #42) June 1 to 30—	
260 Hrs. @ \$6.40*	1,664.00
Inv. 8/20—(CB #47) July 1 to 31—	
18½ Hrs. @ \$6.40*	} 1,404.80
Inv. 8/20—(CB #47) Aug. 1 to 5—	
34 Hrs. @ \$6.40*	
Total to here..... 691 Hrs.....	\$4,422.40

In Possession—Not Used—Aug. 5 to 31 }	Aug. 5 to Oct. 4
“ “ Sept 1 to 30 }	Two Months
“ “ Oct. 1 to 4 }	Possession

Inv. 11/4/43—Oct. 5 to Nov. 1—124 Hrs. @ \$8.00.....\$ 992.00
#601 Blade Returned

Inv. 11/4/43—Operators Time Moving Blade to K's
Warehouse 3½ Hrs. @ \$1.60 5.60
Insurance on Operators Overtime91

Grader #601 Total Actual Billing.....\$5,420.91

*(May 1 to Aug. 5—Operators Wages @ \$1.60 per hr. paid
by lessee.)

[Printer's Note] : †Underscored in red pencil.

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

Corrected Summary—(Continued)

#601 Motor Grader—AW-M-99 All Wheel Drive & Steer, with Heavy Scarifier & Generator for Lights

	Month	Week	Day
OPA Equipment Rental	\$630.00	\$210.00	\$52.50

OPA Approved O & M Rate—\$3.50 per hr.

Possession—May 1, 1943 to Nov. 2, 1943—6-2/30 Months

OPA Equipment Rental—6-2/30 Months @ \$630.00....\$3,822.00

20 Hrs. —June—In excess of 240 Hrs.—1/480 of 630—

1.3125 x 20 Hrs. 26.25

691 Hrs. O & M—May 1 to Aug. 5 @ \$3.50..... 2,418.50

124 Hrs. O & M—Oct. 5 to Nov. 1 @ \$3.50..... 434.00

3½ Hrs. Operators Time—Moving Blade to K's Warehouse & Insurance 6.51

Total.....\$6,707.26

Deduct—Operators Wages Paid by Lessee—May 1 to

Aug. 5—691 Hrs. @ \$1.60 1,105.60

Net OPA Maximum\$5,601.66

Compare with Actual Billing\$5,420.91

#605† Motor Grader AWM-99 w/Scarifier & Lights

Inv. 11/4/43 Oct. 5 to Oct. 13—8 Hrs. @ \$8.00.....\$ 64.00

Operators Time Moving Blade to K. Warehouse 2 Hrs..... 3.20

Total Actual Billing.....\$ 67.20

	Month	Week	Day
OPA Equipment Rental			
Motor Grader AW All Wheel Drive & Steer	\$630.00	\$210.00	\$52.50

O & M Approved Rate—\$3.50 per hr.

Possession—2 weeks

[Printer's Note] : †Underscored in red pencil.

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

Corrected Summary—(Continued)

OPA Equipment Rental—2 Weeks	\$420.00
8 Hrs. O & M Charges @ \$3.50.....	28.00
Moving Blade to K's Warehouse.....	3.20

Total OPA Maximum.....\$451.20

Compare Actual Billing\$ 67.20

Roller, Gas, Three Wheel, 10-Ton

As Billed

11/ 4/43—38 Hours Roller Operating Time—@ \$6.00....	\$228.00
37 Hours Operators Overtime @ 80c.....	29.60
Insurance on Operators Overtime	4.84
11/18/43—2 Hours Roller Rental @ \$6.00.....	12.00

Total Actual Billing.....\$274.44

	Month	Week	Day
OPA Equipment Rental	\$270.00	\$ 90.00	\$22.00

O & M Approved Rate @ \$3.50

Possession—Oct. 5 to Nov. 18—1-14/30 Mo.

Equipment Rental—1-14/30 Mo. x 270.....	\$288.00
38 Hrs. O & M Charges @ \$3.50.....	133.00
37 Hrs. Operators Overtime	29.60
Insurance on Operators Overtime	4.84
2 Hrs. O & M Charges @ \$3.50	7.00

Total OPA Maximum.....\$462.44

Compare with Actual Billing\$274.44

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

[Kuckenberg Construction Co. Letterhead]

BREAKDOWN OF ACTUAL BILLING

Lease & Leigland, Toledo, Oreg.

Rental for October, November, December 1943

To Show Machine Operating Hours and Rental Billed by Units

Week Ending	Equipment	Mach. Hrs.	Amt. Inv.	99-M Patrol		410 Cat & Dozer		410 Cat & Carryall		415 Cat & Dozer	
				Hrs.	Amt.	Hrs.	Amt.	Hrs.	Amt.	Hrs.	Amt.
10/20/43	99-M Patrol	29½	\$236.00	29½	\$236.00	....	.....	....	.....	....	.....
	410 Cat & Carryall	12	139.20	....	.....	....	.....	12	\$139.20	....	.....
10/27/43	99-M Patrol	20	160.00	20	160.00	....	.....	....	.....	....	.....
	410 Cat & Carryall	30	348.00	....	.....	....	.....	30	348.00	....	.....
	415 Cat (& Dozer)	2	18.18	....	.....	....	.....	....	.....	2	18.18
11/ 3/43	99-M Patrol	14	112.00	14	112.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	26½	240.89	....	.....	26½	240.89	....	.....	....	.....
	415 Cat (& Dozer)	11	99.99	....	.....	....	.....	....	.....	11	99.99
11/10/43	99-M Patrol	10	80.00	10	80.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	72½	657.03	....	.....	72½	657.03	....	.....	....	.....
11/17/43	99-M Patrol	4½	36.00	4½	36.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	45½	413.60	....	.....	45½	413.60	....	.....	....	.....
11/24/43	99-M Patrol	9	72.00	9	72.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	42	381.78	....	.....	42	381.78	....	.....	....	.....
12/ 1/43	99-M Patrol	11	88.00	11	88.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	45½	413.60	....	.....	45½	413.60	....	.....	....	.....
12/ 8/43	99-M Patrol	15	120.00	15	120.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	25	227.25	....	.....	25	227.25	....	.....	....	.....
12/15/43	99-M Patrol	46	368.00	46	368.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	59½	540.86	....	.....	59½	540.86	....	.....	....	.....
12/22/43	99-M Patrol	31½	252.00	31½	252.00	....	.....	....	.....	....	.....
	410 Cat (& Dozer)	25½	231.80	....	.....	25½	231.80	....	.....	....	.....
Total Hours		587½ Hrs.		190½ Hrs.		342 Hrs.		42 Hrs.		13 Hrs.	
Total Amounts			\$5,236.18		\$1,524.00		\$3,106.81		\$487.20		\$118.17

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

[Kuckenberg Construction Co. Letterhead]

#99-M PATROL GRADER

Motor Grader—Austin Western—99-M All Wheel Drive and Steer—11 Tons—With Heavy Scarifier and Generator for Lights.

	Month	Week	Day
OPA Rental Rate	\$630.00	\$210.00	\$52.50
OPA Approved Operating & Maintenance Rate @ \$3.50 per hr.			
Possession: From 10/14/43 to 12/22/43—2-8/30 Months.			

OPA Equipment Rental—2-8/30 Mo. @ \$630.00.....\$1,428.00
 190½ Hrs. Operating Charge @ \$3.50 per hr..... 666.75

OPA Maximum	\$2,094.75
Total Actual Billing—L. & L.....	\$1,524.00

#410 CAT & CARRYALL

#410 D-8 Caterpillar Tractor, 4 Drum Power Unit, Generator for Lights and Carryall Scraper, 21½ Cu. Yds. Struck.

	Month	Week	Day
OPA Equipment Rental Rate	\$1,975.00	\$656.00	\$164.50
OPA Approved Operating & Maintenance Service Rate @ \$4.90 per Hour.			

Possession: 10/16/43 to 11/9/43—25 Days.

OPA Equipment Rental—25/30 of \$1,975.00 (65.83 x 25 days)\$1,645.75
 42 Hrs. Operating Charge @ \$4.90..... 205.80

OPA Maximum	\$1,851.55
Total Actual Billing—L. & L.....	\$ 487.20

(Testimony of Charles H. Miller.)

Defendant's Exhibit No. 22-B—(Continued)

#410 CAT & DOZER

#410 D-8 Caterpillar Tractor, 4 Drum Power Unit, Generator for Lights & Bulldozer.

	Month	Week	Day
OPA Equipment Rental Rate	\$1,095.00	\$364.00	\$91.50
OPA Approved Operating & Maintenance Rate	\$4.30 per hr.		

Possession 11/9/43 to 12/23/43—1 month 15 days

(Note #410 Tractor was used with carryall 10/16/43 to 11/8/43. Then it was used with dozer as above. See Carryall sheet.)

OPA Equipment Rental 1½ Mo. @ \$1,095.00.....	\$1,642.50
342 Hrs. Operating Charge @ \$4.30.....	1,470.60
OPA Maximum	\$3,113.10
Total Actual Billing—L. & L.....	\$3,106.81

#415 CAT & DOZER

#415 D-8 Caterpillar Tractor, 4 Drum Power Unit, Generator for Lights and Clearing Blade or Bulldozer.

	Month	Week	Day
OPA Equipment Rental Rate	\$1,095.00	\$364.00	\$91.50
OPA Approved Operating & Maintenance Service Rate	\$4.30 per hr.		

Possession—10/26/43 to 11/9/43—15 days

OPA Equipment Rental 2-1/7 weeks @ \$364.00.....	\$780.00
13 Hrs. Operating Charge @ \$4.30	55.90
OPA Maximum	\$835.90
Total Actual Billing—L. & L.....	\$118.17

(Testimony of Charles H. Miller.)

Q. Referring to these two portions of Exhibit 22, Mr. Miller, are these your computations on the Buckler job for the [196] graders and on the Lease & Leigland job? A. Yes, these are.

Q. And I have here another Exhibit 23. Give that to the witness, please. Referring to Defendants' Exhibit 23, is that an analysis that you have prepared showing the bare rental rates under Regulation 134 on the Goerig job, showing a variation in the amount? A. That is right.

Q. And the rate per hour—

Mr. Wagner: May I interrupt, Mr. Gentner? As I understand it, the witnesses to date, and the indications from the outset of Mr. Kuckenberg's testimony, disclose a defense on the basis of offset. Now Mr. Miller has indicated that he is using an OPA approved rate. Is that right? Is that a change in your theory of defense?

Mr. Gentner: No. That is the rate allowed by the OPA for operating and maintenance service on February 5th, 1943. That is in our contentions as shown in the pre-trial order, and as stated at the pre-trial that is the same contention that we have made right from the beginning. It is in every time that I brought it up here. There is nothing new about it.

Mr. Wagner: I understood you to say at the outset of the trial that either one theory or the other would be applicable.

Mr. Gentner: Well, I don't see how they both could. [197]

(Testimony of Charles H. Miller.)

Mr. Wagner: Very well. I just wondered if you were now on another theory of defense.

Mr. Gentner: Oh, no; we are not on another one at all. This is the same theory.

Mr. Wagner: Very well.

Mr. Gentner: We contend that we were allowed a rate by the OPA, which we are entitled to. That is the defense we always have used. And we will still contend further there was no fully operated rate allowed.

Mr. Wagner: Very well, Mr. Gentner.

Mr. Gentner: That has always been our contention right from the beginning.

Q. Mr. Miller, in your capacity in advising the public as to their rights here under this regulation during the latter part of 1942 and the first part of 1943, that was in the early stages of the making of regulations, was it not? A. Yes, it was.

Q. And, as a matter of fact, conditions were rather—well, uncertain as to rights under these regulations, were they not?

A. With particular reference to the machinery schedule 134. That one particularly, because considerable difficulty—

Q. Did you have anything to do with the Oregon Transfer Company case?

A. With that and many other,— [198]

Mr. Wagner: Objected to, your Honor.

Mr. Gentner: Well, I wanted to show his—

Mr. Wagner: No reason for injecting any other

(Testimony of Charles H. Miller.)

situation into this lawsuit whatsoever. It is entirely immaterial.

Mr. Gentner: —his qualifications for figuring, and the method that was used.

Mr. Wagner: He has already qualified.

Mr. Gentner: The method that the OPA used for figuring during this period. I think that is pertinent.

The Court: Well, don't go into it very much. I am interested only as to his qualifications.

A. Well, in that particular case, the Oregon Transfer case and any others, for that matter, when the parties would come in to find out the application of the regulation it was our job to help them apply that regulation to their problem, and on that particular job I laid out the recommendations for them to follow and the information for them to furnish in order to clear up a job which they had completed but were in doubt about as to its, should I say legality under OPA but had raised a question about OPA themselves and received a letter of commendation for the layout.

Q. Was your method of figuring that Oregon Transfer case the same as what you have submitted here?

A. Yes, identical, except I went further in this one and did the actual figuring, since I was no longer with OPA, [199] but the method of billing, and what to do and how to do it, was laid out by me in a letter.

Q. Was that letter to them approved?

(Testimony of Charles H. Miller.)

A. It was approved in a letter to my price officer to the Regional Office from Washington.

Q. And do you know how long it was after Amendment No. 3 became effective, which was October 22nd, 1942, before printed copies of the regulation were available for the public?

A. They were not generally available until late in January, because the first duties I had was in getting these regulations and distributing them. That was one of the big problems.

Q. January, 1943, then, was it?

A. January, 1943; that is correct; about sixty to—let's see. October—sixty to ninety days.

Q. Were you called upon to advise in regard to the matter of the manner of handling unusual wear and tear?

A. Yes, I was.

Q. And what were your instructions as to what to advise the public at the period that you were there?

A. Well, as price officers we were not permitted to make interpretations of the law naturally. We had to rely upon the memorandum and information from our local price officer or the Regional Office, or the National Office. Most of those were teletypes and interpretations and letters, and there was a mimeographed document sent out to us, questions and answers [200] on the regulation. Statements of considerations would come out, and it was from those documents that we would make the answers to the questions that were asked, to the best of our ability.

(Testimony of Charles H. Miller.)

Q. What was the manner that you instructed inquiries as to handling unusual wear and tear?

A. In the period before the Amendment 9, which came July 1st, 1943, I would say from January, February and March, along in there, would be the period, our understanding of the natural and unusual wear and tear was that the schedule provided rates for normal wear and tear and that the Office of Price Administration would not make decisions or pass on any other types of wear and tear, that should be taken care of by an agreement between the parties involved, and that was in the maximum statement of questions and answers sent out to us.

Q. Now the matter of applying for a rate occurred after Amendment No. 9 on July 1st, 1943, did it?

A. To my knowledge. Nothing was said in the mimeographed statement about applying for a rate for unusual wear and tear.

Q. One other question I had better be sure now about. These computations that you have made of these jobs of Goerig, Buckler, and Lease & Leigland, represent the approximate price allowance under Regulation 134 for the jobs covered?

A. That is correct.

Mr. Gentner: All right. [201]

Cross Examination

By Mr. Wagner:

Q. In connection with the Oregon Transfer situation that you mentioned, Mr. Miller, isn't it a

(Testimony of Charles H. Miller.)

fact that the Oregon Transfer Company submitted certain rates to the Washington office, pursuant to the Regulation early in 1943?

A. I don't know whether they did or not. I know what they did do, however.

Q. But isn't it a fact that those rates were refused and other rates suggested?

A. The first knowledge I have of it is when I received an order from the Price Officer in a teletype to take care of an interview with the Oregon Transfer people through their attorneys and assist them in applying their regulations to the job. Nothing was said to me about their rates.

Q. Isn't it a further fact, Mr. Miller, that you yourself, and the attorneys for the Oregon Transfer Company, worked from early in 1943, or from at least early in the month of July, 1943, until late in December, 1943, in justifying certain rates which had been awarded to it by application and reapplication to the National Office?

A. On my recommendation from the——

Q. Just answer the question now.

A. Yes.

Q. Isn't that a fact? [202]

The Witness: State your question again.

Mr. Wagner: Read the question, Mr. Reporter.

(The question was read as follows: "Isn't it a further fact, Mr. Miller, that you, yourself, and the attorneys for the Oregon Transfer Company, worked from early in 1943, or from at least early in the month of July, 1943, until

(Testimony of Charles H. Miller.)

late in December, 1943, in justifying certain rates which had been awarded to it by application and reapplication to the National Office?")

A. Not myself. Maybe the attorneys. I had one meeting with the attorneys.

Q. Is it not a fact that—I will say is it, or is it not, a fact that a great deal of correspondence was carried on between yourself and the National Office in connection with the Oregon Transfer Company rates?

A. None at all. I corresponded only with my Price Officer.

Q. And who was that?

A. Blair Stewart. Whatever correspondence would have been had was his.

Q. Do you know of any correspondence that was had between the Portland office and the Regional Office and the National Office in connection with the revision and establishing of certain rates under this regulation? [203]

A. Not before my resignation in August, because the work done was done at the conference at which you attended, so far as the local work was done; then the rest was turned over to me to make an outline of how to proceed, which I did.

Q. And you did that? A. I did.

Q. But you do know, as a matter of fact, the Oregon Transfer Company applied to Washington, D. C., and submitted a great deal of material in

(Testimony of Charles H. Miller.)

establishing and justifying the rates that were approved by them?

A. After the job had been completed. They made their application for rates after the job had been completed.

Q. You knew that? A. Yes.

Q. And you know that those rates applied to that particular job?

A. I never saw their rates.

Q. You didn't see them? A. No.

Q. Very well. This computation, what exhibit is it?

Mr. Gentner: You mean this last?

Mr. Wagner: Yes.

Mr. Gentner: 22. That is part of 22. That is on the Buckler case, isn't it?

Mr. Wagner: Q. The computation that you prepared, Mr. Miller, [204] referring to Exhibit 22, on what basis did you make the computation?

A. I used the bare rental rates, as shown in Regulation 134, effective October 22, 1942; that is 134, Amendment 3; and used the operating and maintenance service rates approved by the Washington office to Mr. Kuckenberg in a letter dated February 5, 1943.

Q. And pursuant to what provisions of what regulation did you make that computation in that manner? A. To Regulation 134.

Q. And what provision — any particular provision of the regulation that requires the computation to be made on that basis?

(Testimony of Charles H. Miller.)

A. Yes, sir. The regulation requires that the rental of equipment——

Q. Well, let's get the provision, first. What provision is it? Do you know that?

A. Offhand I can't name it, I think.

Mr. Gentner: Do you want a copy of the regulations, to refresh your recollection?

A. Yes. If I had a copy of the regulations I could tell you. I think it is Section 1399.4.

The Court: Do you want to borrow mine?

The Witness: Any one will be all right. Thank you.

The Court: He has mine. [205]

The Witness: Yes. Section 1399.6; and that is for the operating and maintenance service charges; and Section 1399.2, maximum rental prices. Just a minute. I believe those two cover it. That gives the daily, weekly and monthly basis. Section 1399.3, rates most favorable to lessee; and Section 1399.15, Appendix A, Table of Rates. I believe that covers it.

Q. Did you at any time take into consideration 1399.7?

A. Well, in fact, I considered the entire regulation, yes.

Q. Were you aware of the fact that during March of 1942, more particularly on the 31st day of March, 1942, that the Kuckenberg Construction Company had in effect certain rates for both operating and maintenance and bare rental, in other

(Testimony of Charles H. Miller.)

words, fully operated equipment? Have you ever been apprised of that fact?

A. Since working on this, yes, I have.

Q. Since working on this computation?

A. That is right.

Q. Then assuming you had known that, or had been previously apprised of that, would you have changed your method of computation or would you have continued?

A. I would have continued, because, to my knowledge of the regulation as a price specialist there is no way to apply a fully operated rate at the period covered on specific authorization from Washington, the Washington Office of Price [206] Administration.

Q. Were you aware of the fact that on January 5th, 1943, Kuckenberg Construction Company had made application to the Washington office for approval of certain rates?

A. A copy of that letter was in my office while I was with the Office of Price Administration.

Q. Were you aware of the fact that the March 31st of 1942 rates that the Kuckenberg Construction Company had in effect were other and different than those reported rates?

A. As of what time?

Q. As included in the January 5th letter.

A. You mean January 5th, 1943, was I aware? At what time do you mean?

Q. Have you ever been aware?

(Testimony of Charles H. Miller.)

A. Oh, I was aware of the situation since I worked on this job. Yes, I knew that the two rates——

Q. And knowing that situation, would you have changed your method of computation?

A. Not at all. I can't possibly see any way to change it. But the method used on the Kuckenberg job is the same identical method I used to outline the job just mentioned while I was with OPA.

Mr. Wagner: That is all.

Mr. Gentner: That is all.

(Witness excused.) [207]

Mr. Gentner: I guess we are back again to Mr. Kuckenberg.

The Court: Well then, we will take the afternoon recess.

(Short recess.)

Mr. Gentner: Take the stand, Mr. Kuckenberg.

Mr. Wagner: I would like to recall Mr. Miller, if I may, for just a question or two.

CHARLES H. MILLER

was thereupon recalled as a witness in behalf of the defendants and, having been previously sworn, further testified as follows:

Further Cross Examination

By Mr. Wagner:

Q. Referring to Maximum Price Regulation 134 and its application, Mr. Miller, Paragraph 1399.6

(Testimony of Charles H. Miller.)

under that subparagraph A, does that set forth the particular method of pricing?

Mr. Gentner: Pricing what, Mr. Wagner? I will object to that question. Pricing what? You see, the rents are divided up into two portions, the bare rental and the operating and maintenance service. Now are you referring to the operating and maintenance service, or——

Mr. Wagner: The price itself speaks pretty well for what it is supposed to price. What is it supposed to price?

Mr. Gentner: Your question didn't cover that.

The Witness: Are you asking me this question?

Mr. Wagner: Yes. [208]

The Witness: Section A, or 1399.6?

Mr. Wagner: That is right.

The Witness: The maximum price is for services.

Q. And what do those services include?

A. The operating and maintenance service.

Q. And does it include anything else?

A. Nothing else.

Q. How about the subparagraph B?

A. Subparagraph B contains maximum prices for services.

Q. Of what kind?

A. In the case where the party did not have an established service charge, as defined in the previous section.

Q. And in your application of this regulation, and in your opinion, are those two methods of pricing

(Testimony of Charles H. Miller.)

ing consistent, would you say, or are they inconsistent?

A. Well, they are consistent, as far as I can see, except the Section A has never applied in this area, so far as my administration was concerned. No one qualified under it.

Q. Would you say most methods of pricing in the application of the regulation should be applied simultaneously, or are they to be applied in the alternative? A. In the alternative.

Q. In the alternative? A. Yes.

Mr. Wagner: That is all. [209]

Mr. Gentner: I have no questions.

(Witness excused.)

HENRY KUCKENBERG

thereupon resumed the stand as a witness in behalf of the defendants and further testified as follows:

Cross Examination—(Resumed)

By Mr. Wagner:

Q. My recollection, Mr. Kuckenberg, is that we were discussing, just before the noon recess, some discussions that you had with Mr. Blair Stewart in connection with prices? A. Yes.

Q. Can you tell us just when that took place?

A. It was from January 8th or January 9th, as our contract is dated January 9th.

Q. And one other thing, just before then we were going to ascertain, if possible, during the noon

(Testimony of Henry Kuckenbergl.)

hour, when it was that you first went up to the job.

A. It was about January 4th.

Q. About January 4th?

A. Either the 3rd or the 4th.

Q. The 3rd or the 4th. Now what discussion, if any, did you have with Mr. Blair Stewart?

A. I told him that we had an unusual condition up there; that we had entered into a contract with Georig to furnish certain [210] equipment on a rental basis and after our equipment was on the job we found that the job had been misrepresented to us and that there was unusual wear and tear there, and our repairs and breakages were way beyond normal and asked him if he could enter into an agreement, and just what kind of an agreement we could enter into. I told him it was our idea that they should pay for breakages, outside of normal wear and tear, but that Goerig wanted to pay a straight per-hour price and asked him how we would go about doing that. You told us to draw up an agreement, an addendum to our original agreement, and cite the facts there of our meeting and about the misrepresentation of the original job, and set the price forth in there and who was at the conference which we put into the addendum.

Q. Was this conversation that you had with Mr. Stewart by telephone?

A. Yes.

Q. Or personally?

A. By telephone.

Q. Did you at any time go over to the office to personally discuss this with him?

(Testimony of Henry Kuckenberg.)

A. I was never in your office until the time we took our records up there in OPA.

Q. Was this the only conversation that you had with Mr. Stewart?

A. On this particular point, yes. [211]

Q. Did you ever have any—

A. I talked with Mr. Miller, however, later, possibly in March or April, about the billing of it and asked him if we should bill it as a price of \$13.60 per hour or if we should break down the \$2.00 per hour as a separate item, and at that time he advised me to break it down as a separate item.

Q. Did you discuss your billing with Mr. Stewart at all? A. I don't believe so.

Q. Did you ever have any occasion to contact the Seattle Office of Price Administration in connection with this work? A. No, I never did.

Q. Did Mr. Goerig ever indicate that he had contacted the Office of Price Administration in connection with it?

A. Not to my knowledge. I don't think I ever talked with Mr. Goerig since the job has been completed.

Q. Well, this conference that you had after you came down to Portland from the job?

A. That was in January.

Q. Was it in January? A. That is right.

Q. The 8th or 9th? A. That is right.

Q. That was Mr. Goerig, was it not?

A. That is right.

Q. Now at that time, or at any other time, did

(Testimony of Henry Kuckenberg.)

Mr. Goerig [212] ever discuss OPA prices for these services with you? A. No.

Q. He never did? A. No.

Q. Were you aware of the fact that there was a regulation governing prices on this type of equipment?

A. It was the latter part of December that the A.G.C. mailed us a copy of the 134 3 Regulation. That was the latter part of December, and it was that time that I first called up the Price Administrator, or the price man, and that was Mr. Stewart, and that was the first time I had talked with him, and at that time I asked him how we should apply, and it was from that conversation that we made our application of January 5th.

Q. And from your only conversation with Mr. Stewart?

A. That is right. We had several. I called him several times on it.

Q. But you had more than one, then, with Mr. Stewart?

A. Not in relation to the \$2.00 an hour. This was on our application for a fully operated price. That is a bare rental and a maintenance and operation price.

Q. Did you personally attend to filing your rates with the Washington office?

A. Did I personally go back there?

Q. No. Did you personally attend to the filing or mailing [213] of your application?

(Testimony of Henry Kuckenberg.)

A. Yes. I mailed it back there.

Q. You mailed it? A. Yes.

Q. Do you remember what date it was?

A. I imagine it was the date of the letter.

Q. On January 5th? A. I presume so.

Q. And you were back here in town immediately after you went to Bremerton on the 4th?

A. That is right.

Q. You filed your application then?

A. Uh huh.

Q. And at that time was the first time you had discussed the situation with Mr. Stewart?

A. When?

Q. When you filed this application?

A. You mean previous to that?

Q. Well, no. I am just trying to find out when the first time was that you undertook to ascertain what was necessary in connection with the regulation governing the prices of rental.

A. Well, it could have been any time the latter part of December or the first part of January. I don't remember the exact date that we got the regulation but it was sometime the latter part of the year. It might have been a week before we filed, because [214] it took some time to gather this information and get it ready. It might have been two weeks, even. I don't remember the exact date.

Q. You had a copy of the application mailed to you then?

A. By the A.G.C.; not by the Office of Price Administration.

(Testimony of Henry Kuckenberg.)

Q. The A.G.C. did?

A. They mailed it to their association members.

Q. That was late in December or early in January?

A. As far as I remember, yes. And these prices that we sent back there were based on the prices that we used as of March 31st, 1942, plus an increase in wages. Our wages prior to March 31st of 1942 were a dollar and a quarter an hour and on March 31st, or shortly thereafter, the rate was raised to \$1.60, and that was taken into consideration in this application.

Q. Did you discuss that with Mr. Stewart?

A. Yes.

Q. Did you discuss that with your A.G.C. representative? A. Yes.

Q. What did Mr. Stewart say about that?

A. Put it in there.

Q. He said make an addition to your prices?

A. That is right.

Q. For your labor increase?

A. That is right. [215]

Q. And when did he tell you that, in which conversation?

A. Oh, it could have been the first or the second one. I don't remember.

Q. Well then, as a matter of fact, Mr. Kuckenberg, the prices that you were submitted January 5th, 1943, were not the prices that you had in effect on March 31st, 1942?

(Testimony of Henry Kuckenberg.)

A. They were with the increase in wages.

Q. Well now, wait a minute. Is that the only difference there was? A. That is right.

Q. But actually they were not the same rates that you had?

A. Yes. They are the same rates, with the addition in wages exactly.

Q. Did you in your application disclose that there was an addition by reason of any wages, wage increases?

A. Well, I don't remember. But the letter would speak for itself. I don't have one before me here.

Q. Do you recall what prices you paid for your equipment, Mr. Kuckenberg?

A. No, I don't.

Q. Do you have records indicating that?

A. Yes, we do.

Q. Were you here when Mr. Byrne testified?

A. Yes, I was.

Q. Did you hear the figures quoted by him? [216]

A. Yes, I did.

Q. Did they sound to be in line?

A. As far as they went they were, yes.

Q. As far as they went? A. Yes.

Q. What do you mean by that?

A. We have other equipment there he didn't give any prices on.

Q. What other equipment?

A. On each tractor there is a light plant on it.

Q. A what?

(Testimony of Henry Kuckenberg.)

A. A light plant. There is a bumper in the front of each tractor, on the carryall there is—it comes with 300-foot spools of cable and ours are all equipped with a thousand foot spools of cable and we have built up the bumper blocks.

Q. What are the bumper blocks?

A. Oh, it is a block in the back that we have built up. We have built the cat edges on the sides. in other words, we have put possibly another thousand dollars on the scraper before we send them out.

Q. Do your records indicate that?

A. Our records?

Q. Yes. A. Sure they would.

Q. Did you submit those records to Mr. Miller when he made [217] this computation?

A. No.

Q. Any particular reason for not doing that?

A. Why would I? I didn't give him any prices.

Q. No. I can't get the relevancy——

Mr. Wagner: No. I was wondering if the records were available or if they were not.

A. They are in my office, not here.

Mr. Gentner: You mean if this were included in the price asked Goerig? Is that what you are trying to get at?

Mr. Wagner: No. I just asked him whether records were available indicating the value of this added equipment.

Mr. Gentner: I don't see what Mr. Miller has to do with the cost of equipment when he is figuring prices.

(Testimony of Henry Kuckenberg.)

Mr. Wagner: All right. I will withdraw the question.

Q. Are the records available for the different equipment? A. Here?

Q. No. I mean are they available at your office? A. Yes.

Q. They haven't been so far? A. Oh, no.

Q. You mentioned during the course of construction up there, or shortly after the equipment was ordered off or the job shut down because of the breakage in the equipment, that you wanted to take your equipment off the job entirely. [218]

A. That is right.

Q. And that the Army stepped in and held the equipment?

A. They requested that we leave it there, yes.

Q. Who did that, do you recall?

A. I don't recall his name. Some Colonel with the Army Engineers at Seattle.

Q. How did that order come to you?

A. Which order?

Q. The order? A. By letter.

Q. The order of the Colonel.

A. Requesting us to keep our equipment there?

Q. Yes.

A. It came by letter.

Q. By letter? A. Yes.

Mr. Wagner: Do you have that letter here?

Mr. Gentner: I have that letter here somewhere. If you want it I will dig it out and give it to you.

Mr. Wanger: O.K.

(Testimony of Henry Kuckenberg.)

The Witness: That was a letter. That was in possibly February or March, and that was long after our contract had terminated, because we had rented it out for sixty days and our contract had definitely specified that.

Q. That wasn't the subject of the conference or conversation [219] that you had with Mr. Goerig on the 8th or 9th?

No, that wasn't the time. It was either the first part of March or the end of February we obtained a contract to build an airport at North Bend and at that time we required our own equipment and it was leased, although on that basis, that if at any time after sixty days we required the equipment we could get it, so we wrote them a letter and gave them a reasonable length of time so they could secure other equipment in order to release ours, but they requested—the Army Engineers requested that we leave it there, so we left it there.

Q. During the conference that you had with Mr. Goerig did you indicate to him that you had available for that work up there power shovels?

A. We didn't have any available.

Q. You didn't have any available?

A. No.

Q. Where were they then? A. Spokane.

Q. In Spokane? A. Uh huh.

Q. You had none here?

A. None here. If we had them here they were not right. I don't remember exactly, but I know that most of them were at Spokane. [220]

(Testimony of Henry Kuckenberg.)

Q. Did you make available for the job up there a ripper? A. Yes.

Q. One?

A. One, yes. That is all we owned.

Q. That was up there for how long after that?

A. Well, when they requested the ripper we sent it up there. It stayed there until they got through with it and sent it back. I don't remember the exact dates, but as soon as they requested it we sent it up there.

Q. Who requested it?

A. Well, Goerig, or his superintendent?

Q. They asked for it? A. Yes.

Q. I am handing you Defendants' Exhibit 8, which you have testified to as being a cost summary. From what figures are those taken?

A. Well, they are taken from our payrolls and from the invoices, from payrolls both at Portland and Bremerton.

Q. And are those payrolls likewise summarized?

A. Yes.

Q. Are they here? A. Yes.

Q. Are they also disclosed on their repairs?

A. Here?

Q. Yes. [221] A. Yes.

Q. And are they likewise summarized here?

A. No. They should be on the daily reports, not on the payroll.

Q. Well, will you select from here what the daily reports are? Hand those to the witness, will you, please.

(Testimony of Henry Kuckenberg.)

Mr. Gentner: I have this letter of the——

The Witness: These are a summary——

Mr. Wagner: Oh, that is all right. We will take them later on.

The Witness: These are a summary of the parts and labor used on repairing each tractor.

Q. Are those included, the original documents, included in one or the other of these folders?

A. Yes.

Q. Exhibits 33 and 34?

A. That is right.

Q. You know which one they are?

A. In both?

Q. In both. Hand this to the witness.

A. This covers both labor and parts.

Mr. Wagner: Hand this to the witness and put the board up. If the Court please, is it permissible for me to observe the figures with the witness?

The Court: Yes. [222]

Mr. Wagner: Q. Referring to Exhibit 8, cost summary, I have a column captioned "Unusual Repairs", a total of which is \$33,552.63. Will you explain where these figures originated from. Can you do that?

A. From these payrolls and these bills.

Q. Are these figures as included in the bills, or are they taken from a recapitulation here of Exhibit 26?

A. This recapitulation here totals \$33,552, the same as that. This is a recapitulation of the bills and payrolls.

(Testimony of Henry Kuckenberg.)

Mr. Wagner: I see. All right.

Mr. Gentner: Mention the exhibits so they will show in the record. When you say "this" it don't mean anything. Exhibit 26.

Mr. Wagner: Q. Referring now to Exhibit 26, the left-hand column, captioned "Tractor No." is the figure 414. What does that indicate?

A. That is the number of the tractor.

Q. The number of the tractor. And from under the caption "Parts" is the figure \$2,370.46. Can you in connection with that figure show us where the original documents are?

A. Here is the summary of the original documents. "Final Drive Out (down until 1/14), Bremerton labor \$109.00; parts \$215.03. Replace tracks, 12 rollers", gives you what it is and the dates that the work was done. Then that was taken from bills and on our daily reports here it will show that [223] work was done on 1/8-14/43. I believe 414 is not in here, so it is being repaired upon. It does not show in here as working.

Q. What we are trying to arrive at is this figure over here, \$2370.46.

A. It is right here, \$2370.46.

Q. All right. Now we want the original of this. Referring to the second page of Exhibit 26 we want the original document as described at the top of the page.

A. Well, that will be taken from there.

Q. "1/8-14/43, description, final drive out."

(Testimony of Henry Kuckenberg.)

A. That will be taken from one of these bills. I think that these charges were marked here on the daily reports. I don't seem to find them. On our daily report here this tractor was out from the 8th to the 14th, our No. 61. I had checked, too, for 414 but it is marked down. That means repairs across to there (indicating). And it started working again on the 15th.

Q. You are reading from what, Mr. Kuckenberg?

A. This is daily report from our foreman on the job, or a weekly summary of the daily reports.

Q. That is right. Here it is entitled recap sheet time for Walsh & Hammond; is that right?

A. That is right.

Q. Who are Walsh & Hammond? [224]

A. Well, at that time we understood that they were subbing this work from Goerig. We were renting to Goerig and they were acting as superintendents, or subs, or whatever you want to call it.

Q. And, therefore, no charge price for 414, for Tractor No. 414, was indicated; is that right?

A. That is the same as 61. It is marked there 61, or 414.

Q. Those figures are taken, then——

A. From here (indicating), as far as the time of repair is concerned.

Q. What do these figures indicate here?

A. The hours that the equipment operated, when it is in operation. When it has an hour there it means it is being repaired.

(Testimony of Henry Kuckenberg.)

Q. How did you arrive at this figure 109?

A. That is the labor that is computed against that particular tractor.

Q. Now what is the basis of computation there?

A. That was taken from the payroll.

Q. Taken from the payroll?

A. That is right. And these time sheets are with the payroll.

Q. You mean that amount of labor was deducted from the payroll?

A. No, not deducted. It was picked out of the payroll and put in here.

Q. On what basis?

A. Just what do you mean, what basis? [225]

Q. Well, here you are making a charge for unusual wear and tear.

A. That is what we paid the men that worked on that repair, that \$109.

Q. Is that what your record indicates?

A. That would show that it was done, yes; then the time that was picked off of the payroll for certain men that worked on that particular tractor.

Q. So that your computation is not based on any timecards for natural repair. It is just an estimate of the repair expended by reason of the fact that the tractor wasn't working; is that right?

A. No, that is not right. These records were made up under my supervision by Mr. Gordon and Mr. Giebisch. They were the men who actually had the men working under them and they made up these reports and picked out the time.

(Testimony of Henry Kuckenberg.)

Q. You are referring to what when you say "these reports"? A. This summary.

Q. That is Exhibit 26? A. Yes.

Q. And then we come to this first item on the second page of Exhibit 26, where it says "Final Drive Out", and that was a charge for labor, \$109?

A. That is right.

Q. Now what I am trying to find out is, where did that \$109 [226] come from? How did you figure it?

A. It came off of the payroll and off of the daily report.

Q. Let me see the payroll, then.

A. It came off of the payroll.

Q. Where is it? You point it out to me. Now you are reading from a certified transcript of labor payroll, Payroll No. 7, Sheet No. 1, of 1 Federal Project? A. That is right.

Q. Washington, County of Kitsap, week end January 16, 1943?

A. It says Kitsap County Airdrome.

Q. Will you explain to me how the figure \$109 is arrived at from that payroll.

A. Well, it was the labor that was expended in the labor of that particular final drive.

Q. What on this particular sheet, this Sheet No. 1 of 1, Payroll No. 7, January 16th, '43, what figures indicate a charge for labor of \$109?

A. Well, it is taken from these various men that have worked there. This is a sumamry of it.

(Testimony of Henry Kuckenberg.)

Q. Will you point out to me just what figures were taken?

A. Well, part of all of these figures; parts of all of them.

Q. Well, what parts of what figures? About how many figures are on that sheet, Mr. Kuckenberg?

A. Well, there is a few on here.

Q. Fifteen columns of figures, running about 24 figures deep? [227]

A. Uh huh.

Q. Fifteen columns across?

A. I don't have a breakdown sheet to give you man for man. If that is what you want, I haven't got it here.

Q. What I am trying to find out, you made a computation here and you are putting it in evidence, or attempting to, Mr. Kuckenberg?

A. That is right.

Q. I am trying to find out—you are doing it as an offset?

A. Yes, that is right.

Q. What I am trying to find out is how you made it up. Where did you get it from?

A. We made it up from these figures.

Q. Can you explain to the Court how you made it up?

A. We took the men that worked on that particular item, added them together and put them down here in our recap.

Q. Just show me where it came from.

A. It came from the payroll.

Q. Show me off of this sheet what figures were used to get them?

(Testimony of Henry Kuckenberg.)

A. I haven't got them in my mind. I can't remember.

Q. How would you arrive at them? This is made under your supervision. How would you arrive at \$109 for the figures on this sheet?

A. It probably took six men to do that work. If it took six [228] men a day and a half at whatever it was it would make \$109.

Q. What particular men and what days did you take off of this sheet here?

A. I don't know.

Q. You don't know?

A. No, I don't know.

Q. Following out your method of computing this offset, what ones should be picked out to arrive at this figure?

A. It would possibly be the tractor operator and the mechanic. It would just be a guess on my part, because I don't have the work sheet here covering it.

Q. Do you have that work sheet?

A. Not here.

Q. Where is it?

A. We should have it at the office. It was made up.

Q. Then the original documents in these two folders are not the documents that are used as a basis for making this report?

A. Yes, they are. The payroll is here, which covers the time that has been paid for that work. It is just that we don't have the breakdown.

(Testimony of Henry Kuckenberg.)

Q. Now Mr. Kuckenberg, can you explain to the Court, and to Mr. Gentner and myself, just exactly what method you used? We are just trying to find out evidence here now. A. Sure.

Q. Just exactly what method was used in arriving at this \$109 [229] charge here. Can you explain, in ordinary language, so that we will understand it, just how you arrive at that.

A. A machine broke down and so many men worked on it. Those men are covered on this payroll and have been paid, and that time is added together and put down here in our summary, and the parts are the parts that have gone on there and are covered by these bills.

Q. Now let's stay on the payroll. We are still talking about this \$109 here. A. Uh huh.

Q. Now so many men worked for such and such a length of time? A. That is right.

Q. Now what on these payrolls there indicates that is the fact? Let me ask you this: Approximately what part of this \$33,552 was made up of charges that were arrived at by that same method of computation?

A. What do you mean—on payroll?

Q. Yes.

A. Well, there is only \$2,000 on payroll at Bremerton and \$5,000 in Portland.

Q. On payroll? A. That is right.

Q. And those items, and those totals were taken from the same records here that you have?

A. Yes. [230]

(Testimony of Henry Kuckenberg.)

Q. Payroll records; is that right?

A. That is right.

Q. They were computed on both the Bremerton payrolls and the Portland payrolls?

A. That is right.

Q. Just in the way you have explained?

A. That is right. We have gone through the payrolls and figured out the length of time it took, and the men it took on that particular job.

Q. That is something. How did you figure it out? That is what I want to know.

A. If a man worked five hours at a dollar an hour it would be \$5.00.

Q. For what period of time?

A. For five hours.

Q. Well, you are saying five hours. What do you mean, five hours?

A. You asked me how we figured it. I was trying to show you how we figured it.

Q. The length of time to get it done?

A. No. The length of time they were repairing.

Q. The length of time they were repairing. Do those payroll figures indicate that the particular men listed there were doing repair work on the tractor? A. No. [231]

Q. What do they indicate?

A. They just indicate they worked on that job.

Q. Let's look at the sheet again we were referring to.

A. It just indicates that this particular payroll covers that job of the Kitsap County Airdrome.

(Testimony of Henry Kuckenberg.)

Q. And these are the men that were working that airdrome? A. That is right.

Q. And these are the hours?

A. That is right.

Q. And this is the amount they were paid?

A. That is right.

Q. And the other column is what?

A. What does it say?

Q. Well, you read it. It is your exhibit. Read it. A. Which column?

Q. Read them all right across the top here, reading from—let's get back to the sheet where we were when you picked out one as being the one from which the figures were taken to make this \$109 charge up.

A. It states here the name of the state, the name of the employee—

Q. Are you reading from January 9th? Is that the one we originally had?

A. Yes, sir. Name of employee, hours worked each day, total hours worked, rate per hour, total amount earned, defense [232] stamps, social security, medical aid, Victory tax, hospital and balance due.

Q. Now you have a figure of \$109?

A. That is right.

Q. What records would indicate which of those figures to pick out to make up that \$109, if that is the way you computed it?

A. Well, it was picked off of these reports here.

Q. Daily reports?

(Testimony of Henry Kuckenberg.)

A. That is right. We know this tractor was down on here on the 10th, 11th, 12th and 13th, and started back to work again on the 14th.

Q. What indicates that, Mr. Kuckenberg?

A. Right here. This would indicate it. We know that the machine has not gone back to work. Then that time was picked off of here by Gordon and myself as to the amount of hours that the men worked on that particular machine at that time.

Q. Now what are you reading from?

A. Well, these are the men here who operate.

Q. Yes. A. And the men were——

Q. What sheet are you reading from?

A. This is a daily report.

Q. Daily report; operators' report dated January 16, 1943?

A. That is right. That covers all the machines that were [233] working.

Q. You have a list of operators there?

A. That is right.

Q. How many of them?

A. Two, four, five on that date.

Q. They were all working on tractors, repairing them?

A. No.

Q. Which ones were working?

A. They were operating.

Q. They were operating?

A. That is right.

Q. Which ones were repairing?

A. The ones that are not operating would be taken from this payroll. This covers all the oper-

(Testimony of Henry Kuckenberg.)

ators. It covers one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen.

Q. Eighteen operators? A. That is right.

Q. And there are four on that?

A. There are five on this page.

Q. Five on that daily report?

A. And there are two, four, six here, which makes eleven. So it means there were three repairmen that particular day.

Q. So that, by virtue of the lack of records as to what the [234] men were doing, you made a computation as to the fact, or in order to establish the fact that they were doing repair work on the tractor; is that right?

A. If they are not here working on the tractors they would be repairing, if they were carried on the payroll. Yes, that is correct.

Q. By virtue of the lack of records? By virtue of the lack of records you arrive at the fact that they were working on a cat? What I am getting at, Kuckenberg, is, that there is not any record that directly indicates they were working on the equipment?

A. That is the record that indicates it, yes. That is the only record we have that would indicate it. We paid them. They worked there. They have been on repairs, and if they are not shown here as working on tractors they would have been on repairs. That would be the way we keep it.

(Testimony of Henry Kuckenberg.)

Q. So that in this computation, then, all of the time for which the tractor was not being operated that was charged to that job is multiplied by the total number of hours, of men that were not working on the job operating but still being carried on the payroll?

A. And their repairmen. Yes, that is correct.

Q. But there is no record that indicates actually that they did do repairing, such as going into a workshop and arranging a timeclock? [235]

A. No. We didn't have a time clock.

Q. And there is not a timekeeper on the job keeping it?

A. Yes. Mr. Giebisch is there to keep the time.

Q. He kept the time? A. That is right.

Q. And he kept the time for repairs, did he?

A. Yes.

Q. He did? A. Yes.

Q. Where are those records?

A. Right here. Anything that is not on operation is repairs, and that is the way the time is kept.

Q. Well then, will you just calculate from this sheet, then, what figures were taken to make up this \$109? Pick them out there for me.

A. These two here on the bottom, likely.

Q. Now you are referring to what document, Mr. Kuckenberg? A. To the daily report.

Q. For week end January 16th? A. Yes.

Q. The one headed time for Walsh & Hammond?

A. That is right. This is a daily recap made by the foreman on the job, by Gordon Giebisch, and

(Testimony of Henry Kuckenberg.)

that was sent in to the office and this payroll was made from this, and these would be repairmen right here; they would be Kuhlman and Brand on [236] that particular job.

Q. You are reading from a sheet that is a recapitulation of what? A. Of these daily reports.

Q. Of those daily reports?

A. It is a recapitulation in one way and it is a time sheet in another.

Q. Now explain that?

A. He has kept his time here for the employees that have worked on this sheet and this is that daily report made up for the operation of the equipment and this is the time of the employees. There are two separate and distinct forms here.

Q. I understand that, but this is a recapitulation? A. Of the labor.

Q. Of the labor here?

A. No. This is the daily report—

Q. Explain that now. I mean, we are reading from operators' report now?

A. That is right.

Q. The reason I am asking this is so it goes in the record.

A. This is a report of the equipment and the hours that it has worked, and who the operator was working it, and this is a report of the labor we have paid the various operators and mechanics and anyone working on the contract. [237]

Q. So that if a piece of equipment worked for ten hours during one day the operator for that

(Testimony of Henry Kuckenberg.)

equipment would likewise be working ten *hours* during the day; is that right?

A. He might be working twelve. He might be ten hours in operation and two hours on repairs.

Q. That is not indicated there, however?

A. Yes, it would be indicated here. Here is the time that the tractor is worked right here. That is the hours that the tractor has worked.

Q. That is Marvel?

A. Marvel is 9½ hours. That is tractor work. Over here on the 10th he worked ten hours, as far as we paid him for ten hours.

Q. Who are these operators' report sheets kept by?

A. These were all kept by Gordon Giebisch. He made these up, and this was turned in to Goerig—Georig's superintendent. It would be Goerig's man. This is made up in dupliacte. He kept one copy, we got one copy, then it was signed by the superintendent on the job. These signatures are of the various foremen, I would say, that were around at that particular time. We have to get them for the operation of the equipment.

Q. I see. Now we are getting down to this \$109 figure.

A. Yes. That is right here. That is covered by Kuhlman and Brand.

Q. And can you compute that for us? This sheet, captioned [238] time for Walsh & Hammond, week ending January 16th, 1943, down about the

(Testimony of Henry Kuckenberg.)

middle of the page lists Alfred Kuhlman and C. B. Brand, is it? A. Yes.

Q. With the Kuhlman to the right, indicating figures for Kuhlman 10, 11, 12, 11, 12, 10 and 4?

A. Yes.

Q. And for Brand indicating 10, 10, 11, 10, 12, 10 and 11. Now from these figures you computed——

A. One hundred nine dollars.

Q. One hundred nine dollars? A. Yes.

Q. Now tell us how you did it?

A. Well, Giebisch was on the job and knew the days that the men worked on that particular repair and from that this report here was made.

Q. Giebisch was on the job? A. Yes.

Q. Knew the men? A. That is right.

Q. Knew what dates they worked?

A. That is right.

Q. On repair work? A. Yes.

Q. You mean he remembered that? [239]

A. Yes.

Q. He took that from his own recollection?

A. From the reports here, yes.

Q. Together with this report, plus his recollection?

A. Uh huh.

Q. This figure of \$109? A. That is right.

Q. And when was this computation made?
When was this typed up?

A. I don't remember the exact date.

Q. It was typed up for the purposes of this trial?

A. I don't remember.

Q. What do you call these papers?

(Testimony of Henry Kuckenbergl.)

A. They are a recap of—this is a recap of repairs Bremerton tractors due to unusual breakage, wear and tear, working under extremely hazardous conditions.

Q. And this breakdown of the cost summary, without any doubt on it, was made up in your office, was it? A. Yes.

Q. And who made that up?

A. Well, it was made up by Gordon and Giebisch and myself.

Q. And who typed it?

A. Oh, I don't remember. A stenographer in the office. I don't remember who it was.

Q. Is this your ordinary method of segregating all of your [240] accounts? A. Yes.

Q. Into unusual repairs and ordinary maintenance and repairs?

A. If the conditions warrant a computation.

Q. You have always done that in the past?

A. No, we haven't always done it.

Q. Have you ever done it before?

A. No, I don't think we have.

Q. This method of using Mr. Giebisch's recollection, together with these time reports, and computing the total claimed for the labor part of the unusual circumstances, and wear and tear, was the only method that was used; was that a fact?

A. Yes, that is right.

Q. That is the only method that was used, or were any other methods employed?

(Testimony of Henry Kuckenberg.)

A. We didn't keep a record of unusual wear and tear, if that is what you mean. We had a record of repairs in here and from that we have picked out what we believe is an unusual wear and tear, except the parts we know have gone in it in general wear and tear.

Q. Now this figure of \$109 that we are talking about here—— A. Yes, uh huh.

Q. ——is captioned——

A. Bremerton labor, yes.

Q. Bremerton labor? [241] A. Uh huh.

Q. And now, tell me this: What record, if any, indicates that those repairs were for unusual wear and tear, or whether they were for ordinary wear and tear?

A. Well, we have kept the best records we have known how. We have picked it out. We know putting in a final drive is nothing new for us, and we know approximately how long it takes, and that record was gathered that way. We don't have an actual record of the unusual repair.

Q. Then your segregation as to the usual and ordinary wear and tear, and for the unusual and extraordinary wear and tear, then, is merely based upon recollection; is that a fact?

A. Recollection and what it has cost us in the past to do that particular work, yes. We didn't know a lawsuit was coming up. We didn't know we needed the unusual wear and tear——

(Testimony of Henry Kuckenberg.)

Q. Are all of those computations, in which you claim thirty-three thousand some hundred dollars, are all of those computations based upon the same method?

A. We used these parts on that particular job, these repair parts, and there were certain of these repair parts that were used on unusual wear and tear and breaking, and the rest goes into the motors or different working, or different breakages that are normal, and there are ones that are normal and the others that are usual we have put into the unusual [242] column.

Q. What would indicate breakage as normal or abnormal?

A. For instance, on our tracks——

Q. What gage do you use, Mr. Kuckenberg?

A. For instance, on our track assembly, below, we know, according to our records, that the tracks are worn out in about 500 hours and had to be replaced.

Q. According to what?

A. According to our records.

Q. According to your records?

A. And the normal wear and tear of that equipment is for 4000 hours, so we know there is unusual wear and tear there, and any time that we tear a tongue out, or blow out a tire, a perfectly good tire, we know that is unusual wear and tear. But if something wears out from fatigue, or a motor needs re-ringing or needs a new crankshaft, we know that

(Testimony of Henry Kuckenberg.)

is just ordinary wear and tear and we expect those things.

Q. All right. Now did you in your computation here make a distinction as to the rings and the ordinary shafts, and the piston wear or motor wear as against the track wear? A. Sure.

Q. You did? A. Uh huh.

Q. And all of the charges that you have there for wear on track assemblies are in your classification of the unusual [243] and extraordinary wear and tear? A. No.

Q. I mean, is that the way you made it?

A. Yes. I would say where we put on new tracks and new rollers at 500 hours and they should have given work of 4000 hours, we would charge 80 per cent or 90 per cent of that track as against unusual wear and tear, and that comprises our \$32,000. Yes, that is correct.

Q. Now do these records indicate whether a track replacement or track assembly went for 500 hours or for 4000 hours?

A. Well, we know that we had seven or eight tractors there, and that each one of them ran approximately a thousand hours, and most of the tractors here, I put on here at least two sets of tracks and rollers and the like of that, so we know they ran about 500 hours. That is correct.

Q. You mean during the course of this particular work? A. Yes, that is right.

Q. You put two sets on each machine?

A. That is correct.

(Testimony of Henry Kuckenberg.)

Q. And the charges for those are in these folders right here, are they?

A. That is correct. We don't keep the records at the time of the work, because we don't know anything about those. They usually come up and we don't keep that kind of record, and with the shortage of manpower we possibly don't keep the [244] records that we should, because everyone is trying to produce.

Q. Now also, Mr. Kuckenberg, you have items of Portland labor and Bremerton labor. How did you distinguish as to your Portland labor and which labor went to unusual wear and tear on the Bremerton job, or the equipment used on the Bremerton job?

A. Well, when the tractors came into Portland we overhauled them before they went on the next job, and what was breakage or unusual wear and tear was segregated and charged that way.

Q. O. K.

A. Just the same as they were on the Bremerton job.

Q. Were there any other items included in here besides track assemblies with total unusual wear and tear, or went into the computation for unusual wear and tear?

A. Well, take, here, for instance, on the first tractor, No. 61, or 414, there was a final drive went out and then we replaced a set of tracks.

Q. What is a final drive going out?

(Testimony of Henry Kuckenberg.)

A. The final drive works on the beveled gear on the side of the tractor that turns the sprocket that runs the tractor, and that is based on a shaft and bearings and gears. On the outside of that there is a bellows that works, a bellows seal, and that bellows seal, when sand continues to go around it breaks the bellows seal and the grease leaks out of there because it is full floating and full of grease and [245] the grease will work out and sand and gravel work in. When that happens the bearing goes out, and so the whole side of your case and gears and everything else go with it, and that happened quite frequently on the particular job due to the nature of the material that we were working in.

Q. All right. How many such final drives went out there?

A. Well, this first final drive went out. Then we replaced tracks, twelve rollers, one sprocket and one idler, and replaced a drawbar, replaced final drive housing, and another rail, and six rollers and a sprocket in the Portland shop. When it came in we put it in there. Then we replaced a drawbar in Portland. That would be two sets of tracks and sprockets and rollers. All the rollers were not replaced. There was twelve at one time and six at another; that is a set and a half; and there was just one sprocket a second time, and one gear, and that was due to the way the material was left going on one side and it would wear one side out faster than the other.

(Testimony of Henry Kuckenberg.)

Q. When you say "replace full final driving housing", what does that mean?

A. I didn't say that.

Q. I beg your pardon. You were turning the page and I misread it. Final drive, then, is a part of the equipment only on one side of the tractor?

A. That is right. [246]

Q. Is that right? A. Uh huh.

Q. Are there final drives on both sides of the tractor?

A. Yes, that is correct. They were both separate. They were both in separate housing.

Q. Am I correct in assuming, Mr. Kuckenberg, that each of these sheets of each of these documents here bound together, namely, in Exhibit 26, is a repair on each of the pieces of equipment up there?

A. Yes. One sheet covers one piece of equipment.

Q. One piece of equipment. So that Tractor 414 that we were discussing, only once necessitated having a final drive replaced?

A. Let me see. Isn't there another one down here? There is another one there. It had two.

Q. Two. All right. You replaced final tracks, as indicated here?

A. I can't say very well, Mr. Wagner. I will have to look at it a little closer.

Q. You read it.

A. This is the one I just got through reading.

Q. How many times did you replace the tracks?

A. Twice.

(Testimony of Henry Kuckenberg.)

Q. Twice? A. That is right. [247]

Q. The one was once?

A. Replaced tracks and twelve rollers, replaced rails and six rollers and one sprocket. Rails and tracks are the same thing.

Q. They are the same thing? A. Yes.

Q. So that twice for 414 as to replacements for each, the final drives and track assemblies; is that right? A. That is correct.

Q. Is that complete track assemblies and parts?

A. This would be just the rails. The complete track assemblies were the parts and cost some eight hundred and some dollars, and the rails, yes, are \$540, so I would know from that they are just the rails.

Q. In this particular situation only the rails went out? A. That is correct.

Q. O. K.

A. Most of them are tracks.

Q. Now I am talking about Tractor 416, on January 27th for replacing the rails, and on March 10th replaced tracks. Is that the same thing?

A. Yes, the same thing; twelve rollers and two idlers.

Q. April 26th, there was a different kind of a job done; is that right?

A. Two sprockets and four top rollers. That was done in the [248] Portland shop when it came in.

Q. Now in connection with the labor that has

(Testimony of Henry Kuckenberg.)

been expended on the job, you have listed a total of labor for the Bremerton part of the job at \$2,120.14 for unusual repairs, and total for labor in the Portland shop at \$5,173.14?

A. Uh huh.

Q. Now is that the same method in computing your labor for the Portland work used as was employed here on the Bremerton situation?

A. Yes, that is right.

Q. Are the same records kept?

A. Yes. We picked out from the payrolls what we felt and what we knew was the labor that went into unusual repairs.

Q. And the labor on ordinary maintenance and repairs for Bremerton was \$4,568, and for Portland was \$19,869; is that right?

A. I would like to see it. (Defendants' Pre-Trial Exhibit 8, and trial, was here passed to the witness.) Those are the repair parts, yes.

Q. And these for repair parts, the figures up here I read, four thousand and nineteen thousand, or is that labor? A. That is labor.

Q. All right. How many parts for unusual—how much is listed there for unusual labor, as far as parts are concerned?

A. Well, as far as parts are concerned, unusual, \$25,436.86, [249] and ordinary maintenance and repairs \$8,933. That can very easily be explained, because the \$19,000 covers the entire overhaul of the tractors when we came into Portland, which would necessitate a great deal of labor and very few parts

(Testimony of Henry Kuckenberg.)

because we tear the motors down and clean them out, and lots of times they don't need any, but when they have come off of the job we tear into the tractors, when they have been through a severe job like this one was, and on the job our parts would be much higher than they would be in Portland.

Q. How do you account for that?

A. Well, because we were replacing them right there and we try to keep tractors up as best we can cooperate. When they come to Portland they are supposed to come in in fairly good condition, but we have to overhaul the motors and there will be a great amount of labor expended when they come into Portland but not so many repair parts. That is very unusual.

Q. Now we are looking at this item here on Tractor 416; this is page 3 of Exhibit 26, date January 27th, '43, new rails, six rollers and two sprockets.

A. Uh huh.

Q. Parts \$540. A. Yes.

Q. Do you have an original document in your folders? A. Covering tracks?

Q. Covering that—covering parts. [250]

A. Here is four sets of rails and pads; on December 26th, four sets of rails and pads.

Q. In whose writing is that?

A. That looks like Lee Gordon's writing.

Q. Well now, wouldn't there be an invoice from one of the supply houses for rails?

A. Well, we carry quite a stock of parts out at our shop and most of those parts were taken from

(Testimony of Henry Kuckenberg.)

our stock and shipped to the job. There are some bills from Interstate, where the materials were sent direct from the supply houses, but most of the time we could not get them. They didn't have them. So we took them out of our Portland stock and shipped them to the various jobs. That is the way the jobs have been handled.

Q. How big a stock do you carry out there, Mr. Kuckenberg?

A. Oh, I would say fifty thousand dollars in various repair parts.

Q. All new parts?

A. New parts and reconditioned parts, yes.

Q. New and reconditioned?

A. That is right.

Q. Keep those segregated? A. Yes.

Q. New or reconditioned?

A. Oh, surely. About the only thing we could recondition would [251] be a track rail, and that is putting new pins and bushings in it, but on these jobs here—we haven't done that for quite a while, because these wore right out, so there was no reconditioning them. Here is a bill from Interstate Tractor on one set, two-link assemblies or tractor assemblies, one set. That covers one tractor. Here is seven link assemblies here on March 26th.

Q. How many operating hours are there ordinarily in a month, Mr. Kuckenberg?

A. I beg pardon?

Q. How many operating hours are there ordinarily in a month?

(Testimony of Henry Kuckenberg.)

A. Up there we attempted to run two 8-hour shifts part of the time, and I think part of the time we ran two 10-hour shifts, so you could get, if you ran every day you could get five to six hundred hours in a month. We have run equivalent to that much.

Q. How many shifts did you run on this job up there?

A. Sometimes two and sometimes one. We ran according to the weather. If the weather was such that we would run, equipment was in condition and it wasn't broken down, why, we attempted to run two shifts.

Q. That would run pretty close to five hundred hours a month then?

A. If we ran every day.

A. If you ran two shifts? [252]

A. But there was a lot of time down on that particular job. We were in there parts of December, January, February and March, and parts of April. That is almost four months, and we got approximately a thousand hours on each machine.

Q. A thousand hours?

A. So they ran an average of a little over two hundred hours per month.

Mr. Wagner: I think that is all now.

Redirect Examination

By Mr. Gentner:

Q. Mr. Kuckenberg, how did you total up—how did you arrive at the total of \$66,000? Was that added up by adding machine? A. Yes.

(Testimony of Henry Kuckenberg.)

Q. On the total amount actually paid out on payroll and parts? A. For repairs, yes.

Q. For repairs?

A. Yes. That was added up on an adding machine.

Q. This total of \$90,000, that is all expenditures on that job? A. Yes.

Mr. Gentner: That is all.

(Witness excused.)

Mr. Gentner: Now this letter you wanted from the Major is here, from the War Department, March 24, 1943. I want [253] to call the Court's attention to the fact the last paragraph says:

"In the event you remove this equipment prior to completion, thus adversely affecting the completion date of the project, it will be necessary for this office to recommend that your firm be black-listed to other Government agencies in the Northwest.

"Very truly yours, H. L. Morian, Major, Corps of Engineers, Area Engineer."

I will ask that that be introduced in evidence.

Mr. Wagner: No objection.

(The letter dated March 24, 1943, H. L. Morian, Major, Corps of Engineers, Area Engineer, to Kuckenberg Construction Company, so offered, was received in evidence and marked Defendants' Exhibit 35.)

Defendants' Exhibit No. 35

War Department
United States Engineer Office
Seattle, Washington

AD

March 24, 1943.

Address reply to the Area Engineer, Seattle, Washington Area, 1516 15th Ave. West, Seattle, Washington.

Refer to file No. SWA 451 (Kitsap) 7

Kuckenberg Construction Company,
11104 Northeast Holman Street,
Portland, Oregon.

Attention: Mr. Henry Kuckenberg.

Gentlemen:

Reference is made to telephone conversation between Mr. Henry Kuckenberg and Mr. Shugart of this office on March 23rd regarding equipment rented to the A. J. Goerig Construction Company, a prime contractor under the supervision of this office.

On March 20th, 1943, a meeting was held at the Kitsap County Airport project of interested parties regarding the equipment rented the Goerig Construction Company by your firm. It was understood by this office as a result of the meeting, an understanding was reached between all parties. However, on March 23rd, this office received a copy of your letter to the A. J. Goerig Construction Company threatening to terminate their contract and withdraw the equipment as of March 31, 1943.

As the Kitsap County Airport project is behind schedule, every effort is being made by this office to prosecute the work in a most expeditious manner. In the event the equipment in question is withdrawn from the job, the progress of the project would be greatly slowed down pending location and rental of new equipment. As there is only approximately three to four weeks' work left for the equipment, it is strongly recommended by this office that your equipment complete the job.

In the event you remove this equipment prior to completion, thus adversely affecting the completion date of the project, it will be necessary for this office to recommend that your firm be black-listed to other Government agencies in the Northwest.

Very truly yours,

H. L. MORIAN

H. L. Morian,

Major, Corps of Engineers,
Area Engineer.

Mr. Gentner: We haven't anything further, your Honor. That completes our evidence.

Mr. Wagner: I will try to make this very short. I have only one witness. I would like to put on Mr. Rapp.

REBUTTAL

ANDREW LEE RAPP

was thereupon produced as a witness [254] in behalf of the plaintiff in rebuttal and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wagner:

Q. State your name, Mr. Rapp.

A. Andrew Lee Rapp.

Q. What is your occupation, Mr. Rapp?

A. I am an investigator at the Office of Price Administration.

Q. How long have you been so employed?

A. Nearly two years since, —

Q. June 6th, 1943. And in such employment have you had occasion to deal with price regulation in the case of rental and maintenance of equipment?

A. Yes, Mr. Wagner.

Q. And what regulation is that?

A. Why, it is No. 134.

Q. Are you acquainted with Mr. Miller?

A. Yes, Mr. Wagner.

Q. Was Mr. Miller employed at the office when you were there? A. Yes.

Q. Did you in your capacity have to deal with the same regulation that Mr. Miller did in connection with this type of work, rental?

A. Yes. It is the same regulation.

Q. Are you still so employed? [255]

A. Yes, Mr. Wagner.

(Testimony of Andrew Lee Rapp.)

Q. You are acquainted with Mr. Kuckenberg?

A. Yes. I know Mr. Kuckenberg by sight.

Q. Have you had occasion to examine a great many of Mr. Kuckenberg's records.

A. Yes.

Q. And apply the regulation? A. Yes.

Q. In connection with his charges for rental?

A. Yes.

Q. And you made the transcriptions and computations that are introduced here in evidence, indicated as being Plaintiff's Exhibits 5, 6 and 7?

A. Yes.

Mr. Wagner: The record indicates that this may be a typographical error. I just happened to come across it. The record indicates that Exhibit 5 is comprised of three sheets, and our records indicate that there are five.

Mr. Gentner: Which exhibit is that, Mr. Wagner? Which exhibit is that?

Mr. Wagner: Exhibit 5.

Mr. Gentner: Is that Goerig?

Mr. Wagner: Yes.

Mr. Gentner: How many sheets?

Mr. Wagner: We have five altogether [256]

Mr. Gentner: That is what I have, too.

Mr. Wagner: I wonder if we could have a correction of the record on that?

Mr. Gentner: Sure. That is all right.

Mr. Wagner: May I ask, do we have available an extra copy of the regulation?

Mr. Gentner: Did you say something to me?

(Testimony of Andrew Lee Rapp.)

Mr. Wagner: Do we have an extra copy of the regulation?

Mr. Gentner: Yes. Here is an extra copy.

Mr. Wagner: Q. You explain to the Court, Mr. Rapp, just exactly what method you used in computing whether or not there were excessive charges on the part of Kuckenberg Construction Company in connection with the Goerig, Buckler, and Lease & Liegland contracts?

A. Might I have a copy of the transcription I made?

(A copy was here passed to the witness.)

A. That first listed in the transcript the item of equipment, the month in which it worked, the hours which it worked, the charge Mr. Kuckenberg made, his total charges, the ceiling prices that we established, which I will refer to in a minute when I get through explaining this transcription, the total charge based on what I am calling here the ceiling price, multiplied by the hours worked and then deducting that total charge from the total charge Mr. Kuckenberg made, or Mr. Kuckenberg's companies made. That gives, then, the [257] final column, which shows the excessive charge. The ceiling price as we established it is the rental rate per hour that the Kuckenberg Construction Company rented equipment fully operated to the Kaiser Company, Inc., at Vancouver, on the 31st of March, 1942. Our basis for that is Section 1399.6, maximum charges for operating the maintenance services, (a) maxi-

(Testimony of Andrew Lee Rapp.)

imum prices for services were established charges.

One——

Q. What are you reading from now, Mr. Rapp?

A. 1399.6, Mr. Gentner.

Q. And “(a)”?

A. “(a)”. That is right. “If for any operating or maintenance service a supplier had an established charge in effect on March 31, 1942, the maximum charge to any purchaser or lessee for such service shall be the net charge which the supplier would have received on that date from a purchaser or lessee of the same class. ‘Established charge in effect’ means the charge provided in published service charge sheets or the charge regularly quoted, whether such charge was included within the ‘rental’ under a contract on a ‘fully operated’ or similar basis, or was a separate charge for such service.”

Does that answer your question, Mr. Wagner?

Q. Yes. And that is the section that you had in establishing the price that Mr. Kuckenberg had—the ceiling price of Mr. Kuckenberg?

A. Yes. [258]

Q. Or the Kuckenberg Construction Company?

A. That is right.

Q. Referring to the next section, paragraph (b), under point 6, would you say that that was an alternative method of establishing a price, or a similar or an additional method?

A. Well, I would say it was an additional method provided for those who did not have established prices in effect on March 1st, 1942.

(Testimony of Andrew Lee Rapp.)

Q. Then if a lessor of equipment had in effect on March 31, in 1942, a rental price for fully operated equipment, that would be his ceiling price and not the price that is provided for in paragraph "(b)"?

A. That is my understanding, yes.

Mr. Wagner: You may cross examine.

Cross Examination

By Mr. Gentner:

Q. You have a figure of \$8.60 here for tractors, Mr. Rapp, and the figure of \$2.00 for carryalls? That is right, is it?

A. That is right, Mr. Gentner; yes.

Q. And what is that—bare rental, or the operating and maintenance service?

A. That is the entire rental.

Q. That is the fully operated rental?

A. Fully operated.

Q. You have taken the fully operated charge, then, from the [259] Kaiser contract and applied it here on your sheet?

A. That right.

Q. Is that what I understand you have done?

A. Uh huh.

Q. And that is what you have done throughout?

A. That is right.

Q. You have not taken the operating and maintenance service?

A. No.

Q. And put it here?

A. No. All the compilations there are made the same way.

Q. And your basis, then, is that it is the fully

(Testimony of Andrew Lee Rapp.)

operated rate that was established by the Kaiser contract? A. Yes.

Q. Which includes both the bare rental and the operating and maintenance service?

A. Yes; entire charge for the fully operated.

Q. And the ceiling price as you have it established is of the two combined, not the separate?

A. It is the entire charge.

Q. It is the entire charge, both bare rental and operating and maintenance service combined?

A. That is right.

Q. And that is the basis on which you figured this? A. Yes, sir.

Q. And similarly with the Buckler and the Lease & Leigland? [260]

A. The same figures were used, Mr. Gentner; yes.

Mr. Gentner: That is all.

Mr. Wagner: That is all, Mr. Rapp.

(Witness excused.)

Mr. Wagner: That is our case, your Honor.

Mr. Gentner: We rest also, your Honor.

The Court: What is the amount of your claim as the matter stands now, Mr. Wagner? Single damages?

Mr. Wagner: Our claim as to excessive charges on the Goerig transaction is \$18,000, isn't it? I believe eighteen thousand some—we have it here in just a minute.

The Court: Well, that is close enough.

Mr. Wagner: Eighteen thousand some odd dollars.

The Court: What do you understand their claim to be under the head of excessive wear and tear?

Mr. Wagner: Well, they are claiming, under extraordinary wear and tear, the sum of \$13,784.50, as I gather it, that being the maximum that they claim, as estimated by them by virtue of their oral agreement with the Goerig people, based upon a \$2.00 an hour addition. The figures are merely introduced, as I understand it, in order to substantiate that verbal contract.

The Court: Is that your position, Mr. Gentner?

Mr. Gentner: Our position is that we actually paid out [261] \$13,784.50—no; I mean that that is the most that we could claim as an offset for actual, thirteen thousand seven hundred eighty-four, because that is all we charged under our \$2.00 an hour rate.

The Court: And what is the amount of your claim on those other two accounts, Mr. Wagner?

Mr. Wagner: As to the Lease & Leigland, \$615.19, and as to the Buckler Company \$1182.50. The total of the Goerig claim is \$18,822.46.

The Court: And you have no offset against L & L, and Buckler?

Mr. Wagner: No, none, your Honor.

The Court: And, Mr. Wagner, do you want to be heard on that offset—their right to the offset?

Mr. Wagner: No, I think not. I am satisfied that the figure of \$13,784.50 is substantiated by the evidence that we went into.

The Court: All right. That is very fair. And do you want to be heard on the question of trebling the amount, if recovery is allowed?

Mr. Wagner: Yes, I would briefly, your Honor.

The Court: All right. Let me hear you.

Mr. Wagner: There are a number of other things that are introduced that I might also cover.

The Court: What is that? [262]

Mr. Wagner: For example, the immunity claim. There is a claim of the privilege here as to two of these items. That is a matter that Mr. Gentner and I have discussed at some length, too.

The Court: Well, that is in the two smaller accounts?

Mr. Wagner: That is right.

The Court: Well, what is your view about that?

Mr. Wagner: Well, I would just like to be heard on those two, although I am not entirely prepared as to that.

Mr. Gentner: I would be willing, too, to submit that with our views.

Mr. Wagner: I have some authorities I don't have here.

The Court: Yes.

Mr. Gentner: Mr. Wagner and I would be willing to submit that without argument, if you would likewise—that phase of it.

The Court: Well, tell me about this good faith. You are prepared on that?

Mr. Wagner: The only point that I have to argue, your Honor, is that it is a matter entirely of defense, that the statute is conjunctive, that the

defendant must assume to establish that the violations were neither willful, and likewise neither on account of failure to take practicable precautions. I mean both of those elements are a burden on the defendant in establishing his defense, and I don't [263] believe in any sense of the word can Mr. Kuckenberg be said to have taken all of the precautions that he should have or could have taken in eliminating the violation.

The Court: You said there might be some other cause you wanted to be heard upon—this immunity.

Mr. Wagner: On the immunity I have some authorities I don't have with me, I am sorry.

The Court: Well, you send those up to me when you find them. What else especially do you have in mind?

Mr. Wagner: There was mentioned, your Honor, the matter of discrimination, but I believe there was no evidence upon which—

The Court: You don't need to argue that.

Mr. Wagner: That was the only other thing I believe I did have in mind.

The Court: Let me see then if I have the situation as it exists in mind: If I allow you to recover it will only be for single damages, so that leaves then an item of \$5100 approximately on Goerig?

Mr. Gentner: That is right, your Honor.

The Court: And these two smaller items, \$615 and \$1182.

Mr. Gentner: That is right, your Honor.

The Court: And you are going to send me up, if you care to, what you have on immunity. Now

then, in resolving those three items, approximately, \$5037, \$615 and \$1182, or sixty- [364] eight or sixty-nine hundred dollars, I have the choice between these two theories. That is what it amounts to.

Mr. Gentner: That is right, your Honor.

The Court: On which these two gentlemen have differed?

Mr. Gentner: Yes.

The Court: That is what it comes down to, isn't it, Mr. Wagner?

Mr. Wagner: Well, the situation in connection with the second theory that has been injected into this situation results from our position in a much greater overcharge than upon the theory that we have tried the case on.

The Court: All right. You had better state that again. It may be a little different.

Mr. Wagner: As far as the second theory is concerned, that is paragraph (b) of 1399.6, which provides for an approval of rates by the Washington office. The rates there likewise would require the approval of a rate for operating and maintenance. In that connection the excessive charge would be the thirteen thousand dollar item, plus whatever may be in excess of the rates as approved by the Washington office. Just exactly what they are I don't have handy.

The Court: What about that? Is that a new thought to you? Is this something new?

Mr. Wagner: No. [265]

Mr. Gentner: It is new to me. It is sprung for the first time today, your Honor. I can't follow him at all on it—today for the first time, although this has been up for pre-trial since March, and June and July, and August, and I have had my contentions in ever since this time. I have asked Mr. Wagner repeatedly whether he made any contention about unusual wear and tear, and I think the transcript might bear me out, that I not only asked once but about ten times, and received the answer that he was willing to allow as an offset the actual expenditures for unusual wear and tear. That has been incorporated in the pre-trial order, and now today Mr. Wagner, or this evening, takes the position for the first time that unusual—apparently that unusual wear and tear would be an offset if an established charge had been in effect, but would not be an offset if the charge for operating and maintenance services was arrived at by the second method.

The Court: Which is the method that you rely on?

Mr. Gentner: That is right, your Honor.

The Court: Now wait. Are you agreed so far?

Mr. Wagner: No, your Honor.

Mr. Gentner: I thought he would say——

Mr. Wagner: Mr. Gentner has been well aware of the situation, and even called it to your Honor's attention on a number of occasions, the fact that we had changed the theory [266] of our case. That is true. In the original complaint we adopted the second method, that is the approval method. When

it was discovered that on investigation there was in effect during March of '42 an established rate, then we amended our complaint and at that time changed our theory. Now Mr. Gentner was well aware of that situation, and that is the position we have taken all the way through, and I think that Mr. Miller concedes that it is either one or the other, that you can't have both situations, a conglomeration of both methods of pricing in arriving at this result.

The Court: All you are saying, if I quote you correctly, is that an offset for unusual wear and tear does not lie where an approved rate is relied on?

Mr. Wagner: That is right.

Mr. Gentner: Well, that is a proposition that is advanced for the first time today. It is not embodied in the pre-trial. And in spite of repeated demands and questions to Mr. Wagner during the course of the pre-trials we had, not a word was ever said about that, and that is a new proposition that is interjected here for the first time. It is not embodied in the pre-trials, as your Honor will observe, nor in any other proceedings we had here. This claim is made for the first time today, at the time of trial.

Mr. Wagner: Well, of course, your theory of defense is purely a contention, Mr. Gentner, and I think—— [267]

Mr. Gentner: My theory has been laid out here at the time of the pre-trials that were held here. I stated before, not only once but twice, and em-

bodied them in the pre-trial order which was submitted to you and was in your office almost two weeks, and which you went over paragraph by paragraph, which you did sign, was submitted to the Court and was signed by the Court, and my contentions were embodied in there and have always been the same, and this is something that is urged for the first time in the entire history of this case today.

Mr. Wagner: Mr. Gentner, I will just have to disagree with you, because Mr. Miller and Mr. Rapp here spent a lot of time figuring the excessive charges under the first theory, and nothing was said about offset at that time at all. It was only on the application of the method of pricing under paragraph "(a)" that offset was mentioned, and only in that connection, and I think that is very clear to Mr. Miller and it is very clear to Mr. Rapp, and it is your understanding.

Mr. Gentner: I am the lawyer here, Mr. Wagner.

Mr. Wagner: It is your understanding, too, I think.

Mr. Gentner: My understanding is that there is no difference between the two, so far as unusual wear and tear is concerned; nor can I find any, nor did you ever urge any in any of these proceedings; and I not only asked you once but I asked you four or five times at the pre-trial and [268] received the same answer, and there is nothing, if your Honor will observe, in the pre-trial order to that effect;

nothing at all. The only thing that is in there is that the plaintiffs concede that the actual expenditures are an offset. That has been conceded throughout, and now this is a proposition that frankly I don't understand, and which is raised for the first time tonight.

The Court: Well, so long as I am bound to hold as I did in the Wheeler case, that the plaintiff can't recover because the action wasn't brought by the proper authorities, maybe I had better confine my finding to that, because that is the finding I intend to make in the case.

Mr. Gentner: Well, your Honor, there is a very vital question here. I think that goes to the meat of this, and I think that—of course, I realize it is six o'clock here——

The Court: That is all right.

Mr. Gentner: ——but I think that in a few minutes I could show your Honor—I am sincere in my belief—that this is another proceeding that is brought on a theory that it is not maintained either by the regulation, nor by the Office of Price Administration itself in Washington, D. C., and I think that I can show, your Honor, that this is a very, very clear example of the necessity that exists for having the Administrator pass upon cases before they are brought, because I can't see, with the letters that I have here, that [269] are in evidence here, how the Washington Office of Price Administration would ever have authorized this case, based upon the theory that it is, in view of the letters that they have written. And I think that clearly

demonstrates the point your Honor raised of the necessity of having the main office pass upon the institution of these cases.

Now if your Honor will remember the last witness, Mr. Rapp, I questioned him particularly as to whether or not the basis of his computations, which are the only computations before your Honor, was the fully operated price or whether it was the operating and maintenance service, and he replied that it was the fully operated price, which combines both bare rental and operating and maintenance service. It must be remembered that there are two component parts of a fully operated rate; that is the bare rental, the rental of the bare equipment itself, and then the operating and maintenance service which constitutes the furnishing of a driver or an operator, the oil and the grease and the repairs for ordinary and usual repairs.

Now there is no provision in this regulation for the establishment as of March 31st, 1942, of a fully operated rate, and that is the only evidence that the plaintiffs have produced before your Honor, evidence of a fully operated rate which was the Kaiser Company rate. The equipment was rented on a fully operated basis at \$8.60 an hour to the [270] Kaiser Company on March 31, 1942. Now the regulation expressly prohibits the establishment of any fully operated rate as of March 31, 1942. Not only does it make no provision for it but it expressly prohibits it.

Section 1399.7 reads:

“If any construction or road maintenance equipment is leased on a ‘fully operated’ basis or on any other basis whereby the consideration represents payment both for the rental of such equipment and for the performance of any operating or maintenance service, such consideration shall not exceed the aggregate of the maximum rental price herein provided for such equipment”, which is the bare rental and which is set forth in a price schedule at 1399.15, and the maximum charge herein provided for such service; that is, for the operating or maintenance service; “and the lessor shall separately itemize on the invoice the rental price and the service charge.” Now here comes the last sentence: “This section shall apply whether or not equipment was leased on a ‘fully operated’ or other lump-sum basis in March, 1942.”

In other words, if equipment was leased on the fully operated basis in March, 1942, still the price that would apply for the bare rental is the schedule of prices attached hereto, and the operating and maintenance service charge which is to be obtained in one of two methods: Either by an established charge in effect for operating and maintenance [271] service only as of March 31, 1942, or by the method of computing the cost of operation and a method which would arrive at a figure was that the charge would bear a normal relation to the competitive price—to the maximum price of a competitive supplier, and that price was to be approved or disapproved by the OPA in Washington.

Now this regulation expressly prohibits the fixing of an established price for bare rental of a piece of equipment, and if you cannot establish the price for the bare rental as of March you cannot establish a fully operated price because the two prices are component parts of a fully operated rate and if you can't establish a price on one part of it you can't establish on the whole. It is true that you can establish a price on the operating and maintenance service, but only on that part alone, not on the bare rental. The original regulation which went into effect on May 11th, 1942, applied only to bare rental of the equipment and it established this schedule of rates for each particular amount of equipment, tractor, scraper, and so forth. As to the operating and maintenance services, the price that had been charged in 1942, or which would have been charged but it was not covered by any regulation until this Amendment No. 3 became effective October 22, 1942, and continued until July 1st, 1943, at which time Amendment No. 9 became effective but change that phase of it. [272]

Now Amendment No. 3 reserved and kept in effect the requirement that there could be no established charge for bare rental, and it added this section, making a provision for the establishment of a maximum price for operating and maintenance service in two different methods; and in that respect it differed from the original regulation, the reason for that being that prior to this price regulation equipment was rented in two ways. Usually equipment houses would rent to a logging concern, send

the tractor out and the logging concern would furnish the operator and the oil and take care of the repairs, and that was your bare rental. However, on construction jobs it was an invariable practice to furnish, not only the equipment itself but also an operator, the gasoline, the oil, and take care of the repairs, because it seems that on construction jobs the party renting in most cases didn't have the crew, and the lessor did have the crew, and greater efficiency was established in that manner. So that we find that equipment was rented fully operated by construction concerns, but the price regulation at no time from the beginning of the original, May 11th, 1942, regulation, right up to the present date, at no time, or at any time, has permitted the establishment of a bare rental price by the price that was charged in March, 1942.

Amendment No. 3 has prohibition in Section 1399.1, [273] specifically prohibiting the renting at any price higher than the price established for bare rental in this regulation. It provides that regardless of any contract, agreement, lease, or other obligation, no person shall lease or deliver any construction or road maintenance equipment at a rental price in excess of the maximum rental price established by the Maximum Price Regulation No. 134.

Then it proceeds to establish that under Section 1399.2, and there it refers to the payment of rates at the back, and provides a definite rate for the day, for the week and for the month, and for rates most favorable to the lessee. All rentals of equip-

ment, whether bare or fully operated, must conform to that section of the regulation, and if it is impossible, as this regulation states—and it even goes so far as, in Section 1399.7, which I have read, to say that this section shall apply, whether the equipment was leased on a fully operated basis in March, 1942, and specifically prohibits the establishment of a rate fully operated in March, 1942, then these plaintiffs have no case. Their entire case stands or falls on the proposition that you may have an established pricing in effect for a fully operated rate as of March, 1942. There is no evidence of anything else.

Now to illustrate just what would happen if their contentiton could be maintained, you have only to take one [274] glance at some of the rentals in these very contracts before the Court. Take the Kuckenberg and Buckler rental; take your Motor Graders No. 601, if you would take the shipyard rate, which is the Kaiser Company rate for bare rental, and figure that on the basis of the bare rental that was set forth in that, and which is the component part of what they are claiming here, you would have for the first one for February \$920.40, but if you figured it in accordance with Regulation 134 on this schedule here you would have \$630. Take the next one, No. 603, for the month of May, if you went by the shipyard rate the one for you would establish a bare rental rate, you would have \$963.30, but if you took the OPA rate here this schedule which they say must be followed, you would have \$583.39.

Take the next one, No. 606 for the month of

March, 1943, according to the shipyard rate here it would be \$1104.68, and according to the regulation here, 134, it would be \$686.77.

On the Goerig case, take the cat and dozer, in each case you would have a higher ceiling if you took this shipyard rate for bare rental than what this regulation permits or allows. Now not only does this regulation not permit it and does prohibit such a rate, but the Washington Office of OPA itself has consistently so held by letters. In fact, the letter that the plaintiffs themselves introduced in evidence here as part of their case, which is a letter from [275] the Washington office, so states. We had this letter of Kuckenbergl to the OPA in Washington as of January 5th, which said as follows:

“We herewith submit rental rates, which apply to road maintenance equipment on a fully operated basis. The following rates have been in effect during the year 1942”.

All right. Now here comes the answer:

“This will acknowledge receipt of your letter of January 5, 1943, in which you submit rental rates applying to road maintenance equipment leased by you on a fully operated basis.

“Section 1399.7 of Maximum Price Regulation No. 134”, which is what I read, your Honor, “provides that lessors must bill separately the bare rental rates not in excess of the maximum rates listed in Appendix A and operating and maintenance service charges as established by this office.”

Now here comes the point: "This Section operates, therefore, to prevent any establishment of a fully operated rate."

That comes right from Washington.

Now I have further letters to the same effect. They are in evidence here. Here is a letter February 27th, 1943, to the United Contracting Company. This was from the Washington office:

"We have received your letter of February 16, 1943, in which you report a rental agreement with the Kaiser Company [276] of Vancouver, Washington, which provides for a rental of one Model No. 77 Austin Western Motor Grader for 100 hours at \$7.60 per hour fully operated.

"Maximum Price Regulation No. 134 does not provide for a fully operated contract."

And then they go on in detail and explain why not. It is against Section 1399.7.

Here is a letter to Mr. Ralph R. Gay, at Longview, from the Washington office again, May 7th, 1943:

"Reference is made to your letter and attached schedule dated April 16, 1943, submitting for approval your rental rates for certain equipment."

Now here we are: "Although your rental prices were in effect March 31, 1942, they were on a fully operated basis, combining rental and maintenance plus the hourly charge for operating labor. Section 1399.6 of Maximum Price Regulation 134 states, 'If on March 31, 1942, however, a lessor leased construction or road maintenance equipment on a', then they recite this section. "Inasmuch as you were

not renting on a 'bare' basis on March 31st, 1942, the foregoing Section of Maximum Price Regulation 134 cannot be applied"; and they refused to admit it and they stated that fully operated rates as of March 31st were not approved and could not be in effect under this regulation.

Now here comes another letter, which is a letter [277] by the Mid-Columbia Sand & Gravel Company, May 11th, 1943, in which they set forth fully operated rates on their tractor and other equipment, and here is the answer from the Washington office on May 27th, 1943:

"Reference is made to your letter dated May 11th, 1943, submitting for approval your fully operated charges for certain equipment.

"Although your rental prices were in effect March 31, 1942, they were on a fully operated basis, combining rental maintenance plus the hourly charge for operating labor."

Now again they quote their regulation and state that there can be no such a rate in effect. The Washington office itself, both in this letter to Mr. Kuckenberg and to these other parties, has held there can be no such rate.

Now the plaintiff comes in here and bases the entire case upon the claim that there has been a fully operated rate established, when we find that the Washington office denies that that can be done, and a careful reading of this regulation will show that it not only cannot be done but it is expressly prohibited; and, therefore, I say to your Honor,

in all sincerity, that I am satisfied that a careful reading of this regulation alone discloses that there is no basis for any here on the part of the plaintiffs and that the plaintiffs have not made out any case. There can be no fully operated rate as of March 31, 1942, and there is no [278] evidence, or anything else except a fully operated rate. The rate provided by its regulation in Appendix A for bare rental is of a sliding scale, based upon possession time, and as one of our exhibits here shows, the rental under this price Appendix A schedule varies—is not a fixed rate; it varied on the Goerig job on the case of Tractor No. 48 from \$4.07 per hour to \$15.60 per hour for bare rental. It varied in the case of Tractor No. 411 from \$3.82 per hour to \$25.61 per hour. That is the analysis prepared by Mr. Miller, which is in evidence.

In the case of Tractor No. 417, with carryall, the rent varied from \$6.88 per hour to \$17.65 per hour. Likewise with all of the other equipment. There is no fixed rate provided per hour for the rental of their equipment by this Maximum Price Regulation, and yet the basis for the prosecution here is a fixed rental for bare equipment as a component part of what is claimed to be a fully operated rate.

Now if the price were figured as provided by this regulation, this computation is entirely erroneous, and as the computation will show that Mr. Miller has figured, he has figured it in accordance with the price regulation, showing how the price varies and how the rates differ, so far as bare rental is con-

cerned. The price for operating and maintenance service is a constant one and applies regardless of the number of hours, but the bare rental rate under [279] this regulation, which was in effect, is a fluctuating one, which depends on possession time and the hours of operation and there can be no other basis than the one provided in this regulation, and, therefore, I say that there is no case to submit to your Hoonr at all by the plaintiffs; that they have failed to make out a case at all of any violation at all; and I am satisfied that if the Washington Office of the OPA, from whom these letters came, which are clear and explicit, had had an opportunity to pass upon this before this prosecution commenced upon this theory and upon this basis, or if it were submitted even, knew that there would be no prosecution on this basis because, consistently with what they have repeatedly and always held, there cannot be any fully operated rate established as of March, 1942, nor could there have been any up to the Amendment No. 9 on July 1st, 1943, at which time provision was made for a fully operated rate upon application from Washington and not prior to that time. There was no provision at all. Prior to that time it had had a combination of the bare rental rate in this schedule, plus the operating and maintenance rate, which was fixed in one of the two methods. Now we claim that we had no operating and maintenance rate established as of March 31, 1942, and that is borne out by Mr. Miller, who said that not a single person in this entire territory qualified under that section. He was right there in the

office up to the time that Amendment [280] No. 9 went in, and that is because the Office of Price Administration held that unless you were renting equipment both on a bare basis and on a fully operated basis, you could not have an established charge in effect for your operating and maintenance service, and, therefore, we were obliged to proceed under Section B, which is a rate which is made up of the operating costs and a method appropriate to the service to be rendered resulting in a price bearing a normal relation to the maximum price to the competitive system approved or disapproved by Washington. We have an approved price here, upon which we proceeded and upon which Mr. Miller figured the entire jobs, and which show that in each case we are under the Maximum Price allowed by the regulation, figuring our prices upon the bare rental in this schedule, and upon the price allowed by Washington in the letter of February 5th, 1943. And, therefore, it is our contention, your Honor, that the plaintiffs absolutely have no basis or foundation for any prosecution in this case.

Mr. Wagner: Your Honor, this matter was submitted to the Washington office before these proceedings were instituted, and there are lengthy and detailed reports and computations, and the original computation, that is the basis for the original complaint that was filed, which excluded, or which was not inclusive of the Buckler or the Lease & Leigland transactions but included only the Goerig transaction, the [281] treble claim amounted to \$85,-

077.84, which was three times \$28,359. 28. That was the computation of the Washington office as based upon the approved rates.

Now after it was discovered that there was in effect on March 31st of '42 an established rate by the Kuckenberg Construction Company, and that it gave them the benefit of a higher rate, naturally we amended our claim to make it conform to what we thought it was best for them to have, and that was approved also by the Washington office upon discovery. However, the method of pricing, as was used, was that of Paragraph A of the regulation and not Paragraph B on the approved price.

Now Mr. Gentner's argument to me seems—from the reading of those letters he seems to argue himself just exactly and squarely out of the point he is attempting to make, and that he can have the advantage of pricing under both of these systems, namely, to have the offset and also to have the approved rate. These letters indicate that unless there is a rate that is approved under this second method of pricing, unless there is an approved rate, that the man doesn't have that and anything that he charges would be excessive.

Now I think that the language is clear and simple.

Mr. Gentner refers to Section 1399.7 and calls it a prohibition against the establishment of a fully operated rate. It is not a prohibition at all. All it is to keep [282] somebody who had an excessive fully operated charge as based upon an abnormal rental charge from using that charge where a com-

bination of both the bare rental and the service and maintenance charge would result in an excessive charge. Now it is possible that, in order to get one, the other has to be deducted but the particular paragraph was directed against the type of operator who had a regular maintenance charge in March of '42, and also had a rental charge, and where the combination of both of those would exceed a combination of the maintenance charge and the charge for the bare rental is set forth by this regulation. This is the paragraph that holds them down, and it does it in very simple language. It says:

"If any construction or road maintenance equipment is leased on a fully operated basis or on any other basis whereby the consideration represents payment both for the rental of such equipment and for the performance of any operating or maintenance service, such consideration shall not exceed the aggregate of the maximum rental price herein provided for such equipment and the maximum charge herein provided for such service, and the lessor shall separately itemize on the invoice the rental price and the service charge. This section shall apply whether or not the equipment was leased on a fully operated or other lump-sum basis in March, 1942." [283]

It just means that if the person that had a service charge had a great big rental charge up there he had to come down to his established service charge, plus the bare rentals as set forth in here.

Mr. Gentner: Mr. Wagner, if you had charged on March 31st, 1942, fully operated rate, which

exceeded the bare rental rate provided by the appendix here, plus the operating and maintenance rate, then how would you say that you would get around that angle?

Mr. Wagner: If you didn't have an established service charge, but you have only a fully operated charge, that is your charge of March of '42, but if you have a service charge established and the rental charge, which in the aggregate exceed your service charge as established, plus the bare rental charge as provided for any schedule, you will pull down to that. That is just very simple.

Mr. Gentner: Is it your contention you could not have a pure rental charge established as of March 31, 1942?

Mr. Wagner: I don't understand you.

Mr. Gentner: You know what a pure rental charge it?

Mr. Wagner: Yes.

Mr. Gentner: Do you say it was impossible to establish a pure rental charge as of March 31, 1942?

Mr. Wagner: To establish it?

Mr. Gentner: Yes. [284]

Mr. Wagner: No. That is set forth in the regulation.

Mr. Gentner: Well, you admit that your fully operated rate is comprised of pure rental and operating and maintenance service?

Mr. Wagner: That is right.

Mr. Gentner: If you can't establish your pure rental charge how can you have a fully operated

rate established, then? Doesn't your pure rental rate fluctuate with the hours of possession?

Mr. Wagner: Certainly, Mr. Gentner. It is very simple. Where an operator had only a fully operated rate at this particular time, without having an established service charge, why, his service charge was the difference between this rental and his total fully operated rate.

Mr. Gentner: You take in the Kaiser case, do you say that that was the established——

Mr. Wagner: The situation that you are——

Mr. Gentner: Now just a minute.

Mr. Wagner: The situation that you are talking about has since been changed by amendment to the regulation.

The Court: That was in July, 1943.

Mr. Gentner: We are talking about that particular time. That is right.

The Court: Yes, that is right.

Mr. Wagner: That is right. [285]

Mr. Gentner: Is it your contention—of course, your contention is that a fully operated rate was established by the Kaiser Company contract and that consisted of pure rental as well as operating and maintenance service. You are not contending that an operating and maintenance service charge alone was established by the Kaiser contract, are you?

Mr. Wagner: It is the only rental as established on that date, and the fully operated charge.

Mr. Gentner: Sure. If you take your pure rental, according to the regulation, that would vary, and yet your figures here are exactly identical, are they not? They don't vary a bit?

Mr. Wagner: That is right.

Mr. Gentner: How can it be——

Mr. Wagner: That is the ceiling that is established.

Mr. Gentner: How can there be an identical charge where the number of hours varies from 54-1/2 in a month up to over 240? How could you have an identical charge under this regulation 134?

Mr. Wagner: Because you are revised in 1399.6 (a). It is the single method of pricing, as does Mr. Miller agree.

Mr. Gentner: Mr. Miller does not agree to anything of that kind. Whether he did or not it would not affect it, Mr. Wagner, you will admit.

The Court: The bare retinal is decreased by 50 per cent [286] after 240 hours of operation, is it not?

Mr. Wagner: Not in Mr. Kuckenberg's situation.

The Court: I mean according to the regulation?

Mr. Wagner: No. That is according to regulation.

Mr. Gentner: According to the regulation it is decreased 50 per cent after 240 hours, it is not?

Mr. Wagner: Not Mr. Kuckenberg's operating rate.

Mr. Gentner: Well, is he in a different class from anybody else under this regulation?

Mr. Wagner: Well, he has got an established rate on March 31st of '42, and it is right there in the regulation, and that is one method of pricing.

Mr. Gentner: Where is it in the regulation? I can't find anything that provides for operating and maintenance service only and says nothing about bare rental.

Mr. Wagner: It certainly says here for the operator, Mr. Gentner.

Mr. Gentner: Where does it say that? It says, "Maximum charges for operating or maintenance service", 1399.6. Your prices for maximum rental prices are 1399.2. You could not have a rate that is identical, even the way you have it here, except after 240 hours the price goes down by 50 per cent, and it is impossible to have an even rate.

Mr. Wagner: I will grant you, under one method of pricing that is true, but not under the point 6 method that Mr. Kucken- [287] berg claims.

The Court: He was going to read you something different there. You didn't give him a chance to read it.

Mr. Gentner: All right. Let him read it.

Mr. Wagner: I ask Mr. Gentner to read it.

The Court: I would like to hear it.

Mr. Gentner: "If for any operating or maintenance service a supplier had an established charge in effect"——

Mr. Wagner: Wait just a minute, Mr. Gentner.

Mr. Gentner: —"on March 31, 1942, the maximum charge to any purchaser or lessee for such service should be the net charge which the supplier

would have received on that date from a purchaser or lessee of the same class. 'Established charge in effect' means the charge provided in published service charge sheets or the charge regularly quoted, whether such charge was included within the 'rental' under the contract on a 'fully operated' or similar basis, or was a separate charge for such service. If on March 31, 1942, however, a lessor leased construction or road maintenance equipment on a 'fully operated' or similar basis and also on a 'bare' basis, the established charge in effect on March 31, 1942, for the operating or maintenance service provided in the contract for such equipment on the 'fully operated' or similar basis, when supplied in connection with the rental of such equipment, shall be the difference between the 'rental' price [288] in effect on March 31, 1942, of such equipment on the 'fully operated' or similar basis and on the 'bare' basis. 'Net charge' means the amount charged to the purchaser after adjustment for all applicable extra charges, discounts and other allowances in effect on March 31, 1942."

That absolutely furnishes a method only for pricing operating or maintenance service and not for both operating or maintenance and rental of equipment, which is taken care of in Section 1399.2. There is nothing in there that says there is anything except charge for operating or maintenance service absolutely. There can be no established charge for anything but operating or maintenance service.

The Court: We will adjourn now, Gentlemen, and we will hear you, Mr. Gentner.

(Thereupon, at 6:32 o'clock P.M., Court was adjourned.) [289]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the proceedings had and evidence given upon the trial of the above-entitled cause on Tuesday, November 14, 1944, in the above-entitled court, before the Honorable Claude McCulloch, Judge, and thereafter prepared a typewritten transcript from my shorthand notes so taken, and the foregoing and hereto attached 196 pages of typewritten matter, numbered 94 to 289, both inclusive, contains a full, true and accurate transcript of my shorthand notes so taken by me as aforesaid of the proceedings had and evidence given upon said trial.

Dated at Portland, Oregon, this 8th day of March, A.D. 1945.

ALVA W. PERSON
Court Reporter

[Endorsed]: Filed Aug. 26, 1944. [290]

[Endorsed]: No. 11021. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. Henry A. Kuckenberg, Lawrence W. Kuckenberg and Harriet A. Kuckenberg, co-partners doing business under the assumed name of Kuckenberg Construction Company, Appellee. Transcrit of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 22, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11021

CHESTER BOWLES, Administrator,
Office of Price Administration,
Appellant,

v.

HENRY A. KUCKENBERG, LAWRENCE W.
KUCKENBERG and HARRIET A. KUCK-
ENBERG, co-partners doing business under
the assumed name of KUCKENBERG CON-
STRUCTION COMPANY,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action

the appellant, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. The Court erred in finding as a fact and concluding as a matter of law that the institution and prosecution of this action was unauthorized.

2. The Court erred in finding that the defendants do not have and did not have any established ceiling price as of March 31, 1942, for fully operated tractors, fully operated carry-alls, fully operated graders or fully operated tractors and carry-alls together.

3. The Court erred in finding that the plaintiff offered no evidence of any violation by the defendants of Maximum Price Regulation No. 134, either during the period that Amendment No. 3 was effective or thereafter during the period in which Amendment No. 9 was effective.

4. The Court erred in finding that the consideration at which the construction and road maintenance equipment involved in this action was rented or leased did not exceed the aggregate of the Maximum Rental Price provided by Maximum Price Regulation No. 134 for such equipment and the maximum charge provided by said regulation for operating maintenance service furnished by the defendants.

5. The Court erred in finding that the defendants have proved that they acted in good faith in making the charges they did for rental of equipment and furnishing of operating and maintenance services and for the repair of damage caused by

unusual wear and tear and breakages, and that defendants' violation of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 134 was neither willful nor the result of a failure to take practicable precautions against the occurrence of the violation.

6. The Court erred in concluding as a matter of law that Maximum Price Regulation No. 134 does not provide for the establishment of a fully operated rate as of March 31, 1942 for any construction or road maintenance equipment, and that any leasing or rental of construction or road maintenance equipment on a fully operated basis on March 31, 1942 does not operate to establish said fully operated rate as a ceiling price upon which any claimed violation of Maximum Price Regulation No. 134 may be based.

7. The Court erred in concluding as a matter of law that defendants were entitled to charge A. J. Goerig Construction M. two dollars per hour for tractor operating time for unusual wear and tear, and that the charge of thirteen thousand seven hundred eighty four dollars and fifty cents (\$13,784.50) made by defendants was a proper charge for unusual wear and tear.

8. The Court erred in concluding as a matter of law that defendants did not violate the Emergency Price Control Act of 1942 or Maximum Price Regulation No. 134.

9. The Court erred in concluding that defendants are entitled to judgment.

HERBERT H. BENT

Acting Regional Litigation

Attorney

F. E. WAGNER

District Enforcement

Attorney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the entire certified transcript, including all exhibits, to be contained in the printed record on appeal herein.

HERBERT H. BENT

Acting Regional Litigation

Attorney

F. E. WAGNER

District Enforcement

Attorney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER

The parties hereto having by stipulation so agreed it is now by the Court

Ordered: That in printing the transcript herein the Court omit Exhibit No. 1 save and except change Order D and change Order E, and Exhibits Nos. 2, 27, 28, 29, 30, 31, 32, 33, 34 and 36 in the Court below, but that said exhibits may be considered by this Court on this appeal as fully as though printed.

Dated: June 12, 1945.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed between the above entitled parties by and through their respective attorneys that defendant's exhibits numbered 1, save and except, Change Order D and E, Exhibits numbered 2, and 27, 28, 29, 30, 31, 32, 33, 34 and 36 may be omitted from the printed record or transcript on appeal herein, but that said exhibits may still be considered by the Court as part of the record on said appeal.

In accord with the Designation of Record herein on file, all exhibits will be contained in said printed record on appeal, save and except as hereinabove indicated they be omitted.

HERBERT H. BENT

F. E. WAGNER

Of Attorneys for Appellant

ALBERT N. GENTNER

Of Attorneys for Appellee

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien, Clerk.

No. 11024

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, as Administrator of the
Office of Price Administration,
Appellant,
vs.

A. G. E. ABENDROTH, doing business as Candy
& Tobacco House,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUN 12 1945

PAUL P. O'BRIEN,
CLERK

No. 11024

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, as Administrator of the
Office of Price Administration,
Appellant,

vs.

A. G. E. ABENDROTH, doing business as Candy
& Tobacco House,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of A. G. E. Abendroth, September 29, 1944	9
Affidavit of A. G. E. Abendroth, October 17, 1944	11
Affidavit of Cecelia P. Gallagher, October 14, 1944	2
Affidavit of Cecelia P. Gallagher, October 18, 1944	4
Appeal:	
Certificate of Clerk to Transcript of Rec- ord on, March 23, 1945.....	37
Certificate of Clerk to Transcript of Rec- ord on, March 27, 1945	18
Designation of Record on (CCA).....	40
Designation of Record on (DC)	17
Notice of	16
Statement of Points on	39
Certificate of Clerk to Transcript of Record on Appeal, March 23, 1945	37
Certificate of Clerk to Transcript of Record on Appeal, March 27, 1945	18

Designation of Record on Appeal (CCA).....	40
Designation of Record on Appeal (DC).....	17
Inspection Enforcement Proceedings	20
Names and Addresses of Attorneys of Record	1
Notice of Appeal	16
Order of Dismissal	15
Order to Show Cause	14
Statement of Points on Appeal	39

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

CECELIA P. GALLAGHER
and F. E. WAGNER,

1215 Bedell Bldg.,
Portland, Oregon;

W. DUNLAP CANNON, Jr.,

1355 Market St.,
San Francisco, California,

For Appellant.

REUBEN G. LENSKE,

Yeon Building,
Portland, Oregon,

For Appellee.

In the District Court of the United States
in the District of Oregon

Civil No. 2564

CHESTER BOWLES, as Administrator of the
Office of Price Administration,

Applicant,

vs.

A. G. E. ABENDROTH, doing business as Candy
& Tobacco House,

Respondent.

AFFIDAVIT

State of Oregon

County of Multnomah—ss.

I, Cecelia P. Gallagher, being first duly sworn,
depose and say:

I am one of the attorneys for the above named applicant; I prepared the application on file herein for an order to permit inspection and copying of records; the application to the Court was made because the respondent herein had refused to permit duly authorized representatives of the Office of Price Administration to inspect and copy certain of his records which are required by regulations duly promulgated by the applicant administrator of the Office of Price Administration, to be made and kept for inspection; and because respondent had refused to comply with an inspection requirement issued by the applicant.

Such an inspection of the respondent's records was requested because I have received from many

people who purchase candy and tobacco products from the respondent complaints that they were being charged excessive prices, that they were being required to buy cigarettes in order to buy candy. I have talked with many small retailers who have stated that though they knew they were being overcharged on candy, Abendroth was their only source of supply and they had to pay his price or be without [1*] Many standard brands of candy bars, for which other wholesalers have a maximum price of \$0.75 a box, are being sold by respondent for \$0.85 or \$0.90 a box. From the information that is available to me, I am of the opinion that respondent's maximum price is also \$0.75 a box, but it is only from an inspection of his records that the maximum price can be shown.

Both customers and competitors of respondent have made numerous complaints to me, and to others in the Portland District Office of Price Administration, that respondent has consistently overcharged in his sales of candy and tobacco products.

On May 6, 1944 the Price Executive of the Portland District Office wrote to Respondent by registered mail, explaining in detail the method he was required to follow in order to establish his maximum prices and instructing him to make the necessary price filings on new items by May 15, 1944. I have inquired of the Price Executive and

*Page numbering appearing at foot of page of original certified Transcript of Record.

have been told that respondent has not made any price filings.

Although it is the position of the applicant that the Court has jurisdiction to issue an order of inspection upon a showing by the applicant that inspection and copying of records required by regulation to be kept have been refused, and that no showing of probable cause need be made by the applicant, I believe the foregoing is a sufficient showing upon which an order to inspect may be issued in this particular matter.

[Seal] /s/ CECELIA P. GALLAGHER

Subscribed and sworn to before me this 14th day of October, 1944.

/s/ W. A. STOCKMAN

Notary Public for Oregon

My Commission Expires Jan. 20th, 1947.

Service accepted Oct. 16, 1944.

REUBEN G. LENSKE,

Atty. for Respondent. [2]

[Endorsed]: Filed Oct. 16, 1944.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon

County of Multnomah—ss.

I, Cecelia P. Gallagher, being first duly sworn, depose and say:

I am one of the attorneys for the petitioner in

the above entitled matter, and have read the affidavit of A. G. E. Abendroth, filed herein.

On January 12, 1944, Investigator E. J. Singleton of the Office of Price Administration at my direction made his first call at the office of A. G. E. Abendroth, doing business as Candy and Tobacco House. At that time he talked with A. G. E. Abendroth and asked for permission to examine the records which establish the maximum and the selling prices of items named in Maximum Price Regulation 421 which governs the prices for certain food items sold at wholesale, and discussed with Abendroth his registration with the OPA under certain rationing regulations.

Said Singleton and Investigator Charles Harris made the following calls at the office of Candy and Tobacco House, and took from the office, with the permission of Abendroth, the following records:

January 20, 1944—126 purchase invoices from grocery file, returned Feb. 2, 1944.

February 2, 1944—53 customer invoice Books from August 3, 1943 to Sept. 4, 1943 returned February 22, 1944.

February 8, 1944—34 Misc. grocery Purch. Invoices, returned February 16, 1944.

February 16, 1944—8 Misc. grocery Purch. Invoices, returned February 23, 1944.

February 23, 1944—56 Customer Sales Invoice Books for September, 1943, 6 Outside Salesmen Sales Books, 23 Misc. Grocery Purch. Invoices, 1 Eatsum File. Returned the above 86 items February 28, 1944. [3]

February 28, 1944—81 Customer Sales Invoice Books, 1 Burry Purch. Invoice on Benson Hotel stationery. Returned the above 82 items 3/6/1944.

March 6, 1944—2 Outside Salesman Customer Invoice Books, returned March 15, 1944.

March 15, 1944—42 Misc. Customer Sales Invoice Books, 2 Eatsum Purch. Invoices, returned them March 20, 1944.

March 20, 1944—10 Misc. Customer Sales Invoice Books 1/14 to 1/25, returned March 29, 1944.

The purpose of the investigation conducted on and after January 20, 1944 was to determine whether or not there existed any violations of the price and record keeping requirements of Maximum Price Regulation 421 (Hereinafter referred to as MPR 421; this investigation was one of a series of investigations of all the wholesale houses in Portland, and with very few exceptions, the rest of the state of Oregon, with respect only to compliance with and violations of MPR 421.

Under the provisions of MPR 421, prices for food items are determined on the basis of the seller's purchases made immediately prior to August 5, 1943; while maximum prices for candy and tobacco products are determined under the General Maximum Price Regulation by the highest price at which the seller delivered the same kind of candy or tobacco during March 1942. Therefore, an examination of purchase records for the period of time which establishes the maximum price of groceries under MPR 421 reveals nothing concerning the maximum price of candy and tobacco

products under the General Maximum Price Regulation. An examination of sales records does not disclose compliance with or violations of maximum prices established by either of these regulations unless the sellers maximum price is known from an examination of his purchase records.

At the time the two investigators were investigating the records of respondent herein, they were instructed to and did limit their investigation to the question of compliance with or violation of MPR 421. This investigation was so limited because the examination of the records subject to the provisions of MPR 421 alone, the transcriptions thereof; the calculation of maximum prices therefrom; and the determination and computations of overcharges required the examination, transcription and calculation of approximately 6000 transactions. [4]

That as the examination of the records proceeded with respect to maximum prices established under MPR 421, it appeared that a sufficient number of substantial violations of MPR 421 had occurred and were occurring to require the institution of litigation for the purpose of requiring defendant to comply with that regulation. Said investigators were, therefore, instructed to and did proceed as expeditiously as possible to complete their investigations with respect to MPR 421. To have proceeded at the same time to investigate to the same extent the situation with respect to respondent's compliance with or violation of the General Maximum Price Regulation in his sales of candy and

tobacco products would have delayed conclusion of the investigation of compliance with MPR 421 for a substantial period of time during which it appeared that violations of MPR 421 would continue.

Immediately upon the completion of this investigation, on the 18 day of April, 1944, I wrote to Abendroth a letter advising him of the findings of the investigation. Immediately thereafter, I prepared a complaint for injunction and treble damages, and was at all times thereafter ready to file said complaint. I withheld the filing until August 4, 1944 for the single reason that the respondent, through Reuben Lenske, his attorney, requested, on a succession of occasions, for a succession of different reasons, that the filing of the complaint be delayed.

Dated at Portland, Oregon, this 18th day of October, 1944.

CECELIA P. GALLAGHER

Subscribed and sworn to before me this 18 day of October, 1944.

LOWELL MUNDORFF,

Clerk

By V. O. BISHOP,

Deputy Clerk.

[Endorsed]: Filed in open court Oct. 18, 1944.

[5]

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon

County of Multnomah—ss.

I, A. G. E. Abendroth, being first duly sworn upon oath, depose and say:

That I am the respondent in the above-entitled matter;

That prior to April 18th, 1944, two investigators from the Enforcement Division of the Office of Price Administration, Portland, Oregon, came to the place of business of respondent in the City of Portland and made certain representations, which are immaterial here;

That thereupon respondent permitted said investigators, the name of one of whom is E. G. Singleton, to examine any and all records of any and all kinds that respondent had; that said E. G. Singleton examined numerous invoices and other books and records of respondent; that said investigators also took from the place of business of respondent and to the Office of Price Administration numerous invoices and various records of defendant, presumably for investigation; that for approximately two months prior to April 10th, 1944, said two investigators worked upon and examined in detail the records of respondent; that no obstacles of any kind were placed in the way of said investigators, and that respondent aided and assisted said investigators in finding and locat-

ing the invoices and other information [6] from respondent's records;

That said investigators had full and free opportunity at said time to examine all of respondent's records that they desired, and that it is unreasonable and arbitrary and improper for applicant to seek or obtain further examination of any of the records of respondent;

That said investigation caused an interruption of business at considerable expense to respondent, and any further investigation would do likewise;

That it was not the intention of Congress to permit unreasonable and arbitrary subjection of businesses to investigations by applicant, and that this would be such unreasonable and arbitrary investigation;

That litigation is now pending between applicant and respondent in this very Court, and that it would be unfair and improper for applicant to obtain advantage by other or further investigation or examination of respondent;

That respondent has a small business, for the nature and kind of business it is, and has only three inside employees, and investigation on the part of the applicant requires the expenditure of time by respondent and his employees, which respondent cannot afford.

A. G. E. ABENDROTH

Subscribed and sworn to before me this 29th day of September, 1944.

[Seal]

R. G. LENSKE

Notary Public for Oregon

My commission expires: July 1, 1944.

Service accepted September 29, 1944.

CECELIA P. GALLAGHER

Attorney for Applicant

By A. STOCKMAN

[Endorsed]: Filed Sep. 30, 1944. [7]

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon

County of Multnomah—ss.

I, A. G. E. Abendroth, being first duly sworn, depose and say:

That I have read the affidavit of Cecelia P. Gallagher and deny the statements therein except insofar as they agree with the facts as herein set forth, and I further make note that no names of any kind are set forth in said affidavit; that I deny that I have been selling candies at higher than prices fixed under the price regulations, and that I further state as follows:

That for approximately two months my books and records, including all of my invoices, without exception were under the control and subject to

the inspection of two investigators under the Office of Price Administration of the Portland District; that whatever of any invoices or other records of affiant that said investigators desired, I permitted them to take to their own office for further examination; that said investigators examined invoices covering candy purchases and sales as well as numerous other items purchased and sold by affiant in his business;

That I discussed the matter of specific candy sales with Cecelia P. Gallagher prior to the time that the investigators examined records of affiant; that full and free opportunity was given [8] to and at least in part was taken advantage of by said investigators in examining records of affiant;

That the fact that said investigation was made during said two months period this year took a great deal of the time of affiant and also some of the time of affiant's office help; that affiant has a very small business compared to the vast majority of similar type of businesses in the Portland area, and that affiant has only two persons working in his office besides himself, and that it not only entails an expense on the part of affiant to be submitted to examination, but also effects a serious disruption of his business;

That affiant firmly believes that he has not violated and is not violating any OPA regulations respecting his sales of candy, and that he at no time concealed prices from customers or from OPA questioners or from any one interested; that affiant, together with other persons in the same line of

business, is suffering from a shortage of cigarettes and has not and does not require the purchase of cigarettes by a customer in order that said customer may be sold candy; that affiant is not the sole source of supply for any retailer of any of the products that he sells, and because affiant is a comparatively small business, the principal sources of supply of candy and cigarettes and groceries are through the other sources and not through affiant;

That I have just read the affidavit of October 14th, 1944, and this is the first time that it has ever been mentioned to me that there is something further to be done on my part with respect to price filings; that I have to the best of my knowledge complied with all requirements in that respect, but I intend to immediately check into the matter further, and if there is anything further to be done on my part along that line, I shall do so promptly;

That to permit the Office of Price Administration to cause me the expense and time of being investigated twice for the same [9] period of time at sacrifice to myself would not be just to me and would be granting an arbitrary and unreasonable right which would cause an undue hardship against affiant, even if it were possible for the Price Administrator to find some errors on the part of affiant.

[Seal]

A. G. E. ABENDROTH

Subscribed and sworn to before me this 17th day of October, 1944.

R. G. LENSKE

Notary Public for Oregon

My commission expires July 1, 1945.

Service accepted this 17th day of October, 1944.

CECELIA P. GALLAGHER

Attorney for Applicant

[Endorsed]: Filed Oct. 18, 1944. [10]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

It appearing from the application filed herein and the annexed affidavit of Charles Craig, that the Respondent, after request made upon him for permission to inspect and copy certain specified records and after the service upon him of an inspection Requirement issued and signed by the Administrator for the Office of Price Administration, has refused and does still refuse to permit the inspection and copying of said specified records;

And the Court being fully advised in the premises, it is hereby

Ordered that the Respondent appear and show cause on the 2nd day of October, 1944, at the hour of 10 o'clock A. M., before the undersigned Judge of the United States District court of the District of Oregon, why an Order should not be made requiring the respondent to permit duly authorized

representatives of the Office of Price Administration to inspect and copy the following records: Each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco during the month of March, 1942; also each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco to all customers of respondent between the dates of November 1, 1943 to and including August 22, 1944; also each and every original purchase invoice in possession of respondent showing purchases of candy and candy products, gum, cigars, cigarettes and tobacco from his various suppliers between the dates of November 1, 1943 to and including August 22, 1944.

Dated this 19th day of September, 1944.

/s/ CLAUDE McCOLLOCH

United States District Judge.

[Endorsed]: Filed Sept. 19, 1944. [11]

[Title of District Court and Cause.]

ORDER OF DISMISSAL

On this 5th day of December, 1944, this cause comes on to be heard before the Court for final disposition herein, and the Court being advised and having enjoined defendant from further violations in the companion cause Number Civil 2532, Chester Bowles Vs. A. G. S. Abendroth, etc.

It Is Ordered that the application requiring the respondent to permit further inspection of inventory and records be, and the same is hereby, denied; and,

It Is Further Ordered that the above cause be, and the same is hereby, dismissed.

Dated at Portland, Oregon, this 5th day of Decembr, 1944.

(Signed) CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed Dec. 5, 1944. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To A. G. E. Abendroth, respondent above named and to Reuben G. Lenske, his attorney.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, applicant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain order dismissing said action, made and entered in the above entitled action on the 5th day of December, 1944.

Dated at Portland, Oregon, this 24th day of February, 1945.

/s/ F. E. WAGNER

/s/ W. DUNLAP CANNON, JR.

Attorneys for Appellant

Chester Bowles,

Administrator

[Endorsed]: Filed Feb. 24, 1945. [13]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Plaintiff's Affidavits filed October 16 and October 18, 1944
2. Defendant's Affidavits filed September 30 and October 18, 1944
3. Order to Show Cause
4. Order of Dismissal
5. Transcript of Hearing on Motion for Order to Show Cause October 2, 1944
6. Transcript of Hearing on Motion to Dismiss, October 18, 1944
7. Notice of Appeal
8. This Designation

Dated at Portland, Oregon, this 23rd day of March, 1945.

/s/ F. E. WAGNER

Of Attorneys for Appellant

[14]

State of Oregon

County of Multnomah—ss.

L

Due service of the foregoing Designation of Record is hereby accepted by receipt of a duly certified copy thereof in Portland, Oregon, this 23d day of March, 1945.

/s/ REUBEN G. LENSKE

Of Attorneys for Defendant

[Endorsed]: Filed March 23, 1943. [15]

CLERK'S CERTIFICATE

United States of America

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 16 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2564, in which Chester Bowles, as Administrator of the Office of Price Administration is plaintiff and appellant, and A. G. E. Abendroth, doing business as Candy & Tobacco House is defendant and appellee; that said transcript has been prepared

by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed duplicate transcripts of the testimony taken in this cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of March, 1945.

[Seal]

LOWELL MUNDORFF,

Clerk

By F. L. BUCK,

Chief Deputy [16]

In the District Court of the United States
for the District of Oregon

Civil No. 2564.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

A. G. E. ABENDROTH, doing business as Candy
and Tobacco House,

Defendant.

Portland, Oregon, Monday, October 2, 1944.
10:35 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Miss Cecelia P. Gallagher, Attorney for the
Plaintiff.

Mr. Reuben G. Lenske, Attorney for the
Defendant.

Alva W. Person, Court Reporter.

INSPECTION ENFORCEMENT PROCEEDINGS

The Court: Mr. Lenske.

Mr. Lenske: I am here in connection with the
application [1*] for the examination by the OPA

*Page numbering appearing at top of page of original Reporter's
Transcript.

of records of A. G. E. Abendroth, doing business as Candy and Tobacco House, Civil 2564.

The Court: And you are here with an order in another case, Mr. Skulason?

Mr. Skulason: Yes, your Honor.

The Court: You want to be heard, Mr. Lenske?

Mr. Lenske: Yes. If it please the Court, this case comes up on the application of the Administrator, and the following are the facts:

The defendant in this case, and respondent, is a defendant in a suit that is pending before this Court at the present time.

The Court: No appearance in the other case, is there?

Mr. Lenske: Oh, yes.

Miss Gallagher: That motion to dismiss was brought to your Honor last week. There has been no answer filed since that time.

The Court: There was no appearance, was there?

Mr. Lenske: No. Here is what happened on this, your Honor.

The Court: Let me clear my mind. I carried forward a case, a companion to Mr. Skulason's. Is this the one?

Miss Gallagher: That is this one.

The Court: At that time there was no appearance, was there?

Miss Gallagher: That is right. [2]

The Court: Since then there has been?

Miss Gallagher: Since that affidavit was filed Mr. Lenske was here. The order was set by your

Honor to show cause, setting the time down for today.

The Court: All right.

Mr. Lenske: I might say, your Honor, the notice of this matter having come up last Monday apparently was mailed out by registered mail Friday of the previous week.

The Court: All right.

Mr. Lenske: It didn't reach the defendant in the case until Tuesday, which was the day after——

The Court: All right. Go ahead. Don't waste any time.

Mr. Lenske: There is already pending a suit for \$15,000 treble damages between the Administrator and the defendant in this case, and that case is pending in this Court. The defendant is in the grocery business, principally small wholesale grocery, and about March or April of this year the two investigators from the Office of Price Administration came to the defendant, or respondent,——

The Court: You don't need to take this, unless requested to.

Miss Gallagher: Mr. Wagner has requested that we do have it taken down.

Mr. Lenske: In March or April of this year the two investigators from the Office of Price Administration examined [3] the records of the defendant.

The Court: Why don't you let them see your records? Can't we short-cut this?

Mr. Lenske: No. We feel it would be just arbitrary and improper if a further examination of the record at this time were made. All of the records

of the defendant were available to them in the spring of this year. As a matter of fact, boxes of invoices, I understand, were taken from the place of business to the Office of Price Administration so they could examine them there at their greater leisure and over a period of two months, I believe, the Price Administrator did investigate, did have the records and did examine them. Now doing a matter of that kind causes disruption of business. It is only a small business. There are only three persons working inside.

The Court: Why did you need to see them again, Miss Gallagher?

Miss Gallagher: Your Honor, the records which were examined in March and April of this year are the invoices showing the purchases, and the invoices showing sales of groceries that are regulated under the price regulation 421, canned goods, cookies, crackers, things like that. We did have those records. We examined them. We have filed a suit, an action, based on our findings in that examination. The records we are requesting this time are the purchase records and the [4] sales records of sales of candy, tobacco, cigars and cigarettes, candy and candy products. Those products are regulated under the General Maximum Price Regulation. Those records we have never had an examination of. Two years ago we had a very brief discussion—or we had several discussions with Mr. Abendroth on his candy prices. At that time we did look at a few records, but no extensive investigation has ever been made of his purchases

and his sales of candy. Those that we examined before are on products controlled by an altogether different regulation and we have not looked at these.

The Court: Now let me hear Mr. Skulason and I will come back to your case.

Miss Gallagher: All right.

(Another matter was here taken up but shortly interrupted, as follows:)

The Court: I don't think I need to keep Mr. Lenske here. What is the number of your companion case, Mr. Lenske, the principal case? 2564 is your supplemental proceeding.

Mr. Lenske: I will give that to your Honor in a second. 2532.

The Court: Yes. Have the pleadings been made up in that case?

Mr. Lenske: Well, no. We just argued a motion on that last Monday and no order has been entered on that yet. [5]

The Court: Argued a motion before whom?

Mr. Lenske: Before your Honor. It was a motion to dismiss one of the causes of action, to require a bill of particulars.

The Court: Well, I ruled on your motion?

Mr. Lenske: You ruled on the motion. You reserved one.

The Court: Reserved it until pre-trial.

Mr. Lenske: You reserved one until trial and overruled another.

The Court: Yes. That is the treble damage case?

Mr. Lenske: Yes.

The Court: Yes.

Mr. Lenske: Well, I will have an answer in sometime during the week.

The Court: Now then, did we give it a pre-trial date?

Mr. Lenske: No.

The Court: Is a jury demanded in the case?

Miss Gallagher: Not by us, your Honor.

Mr. Lenske: There isn't yet. I don't know whether there will be. I will have to find out.

The Court: All right. Then I will tell you what you do: You get your answer in this week. You say you can do it.

Mr. Lenske: Yes.

The Court: All right. You will be up here next Monday, without doubt, Miss Gallagher, and his answer is going to come in this week, and next Monday you remind me of this [6] case again.

Miss Gallagher: Yes, your Honor.

The Court: Intervening events will determine what I will do with it. All I want to be sure of now is that you get your answer in this case this week.

Miss Gallagher: It is perfectly clear these are two separate and distinct cases, your Honor?

The Court: One of them is a proceeding for discovery and the other is a trial of a damage issue.

Miss Gallagher: Yes, but the discovery is aimed toward a different particular and a different set of circumstances than the case which is already filed.

The Court: Oh, it is?

Miss Gallagher: Yes, your Honor.

The Court: Oh, I see. So if you get the information you want you will bring another case against him?

Miss Gallagher: That is right.

The Court: Oh, I see. Well, now then——

Mr. Lenske: Of course, we feel this way, your Honor: They had complete and absolute cases, and our records, and did examine even those records to some extent, and the Court has discretion in the matter. It would be an improper use of the discretion to permit them to go piecemeal and disrupt our business some more when they had full and fair opportunity to completely, in all respects, examine in all respects. [7] Candy is only part of the grocery store anyhow. To say one day, "We will take all your records of milk", and another day, "We will take all your records", and so forth, and in particular after time elapsed, I think is an improper method of doing business on the part of the Administrator. They had that right so far as they went, and at that time they exercised it, and it would be improper for them to go ahead now and disrupt our business further by asking for our records and asking us to give them to them again. They had two months on the other.

The Court: Now on separate cases I won't rule. I will hear Mr. Skulason now but defer this. You don't need to wait any further, unless you want to.

Mr. Lenske: All right.

(Thereupon, at 10:47 o'clock A. M., this matter was adjourned.) [8]

Wednesday, October 18, 1944, at 9:40 o'clock A. M., the following proceedings herein were had:

The Court: I will hear you, Mr. Lenske.

Mr. Lenske: If it please the Court, ask the Court to bear in mind I filed a motion for dismissal of the order to show cause, along with a counter-affidavit, and I would like to just point out to the Court that I think there is a question of jurisdiction involved here also, as well as a question of discretion, in the event that the Court does have jurisdiction. In other words, I have two points. One in my motion is the question of the jurisdiction of the Court, and then in addition to that question, if the Court does have jurisdiction, as to whether it should exercise its discretion in issuing the order for inspection.

On the question of jurisdiction, I have two points. One of them is that the act itself, as I gather it, says that the Court has jurisdiction where subpoena has been issued. In this case there had been no subpoena issued by the Administrator. It was an order of inspection, which, I take it, is different than a subpoena. A subpoena, I presume, would give a person certain rights. Of course it might require him to bring in his records and permit them to be looked at at the time, or at any rate there is a difference between a subpoena and an inspection, and, as [9] I read the regulation, or the statute—rather, the statute—it gives jurisdiction only where there has been a subpoena issued. So far as a situation of this kind pertains, there has been no subpoena issued, nothing in the

files, or in the affidavits, that would show that a subpoena has been issued.

My point No. 2, so far as the jurisdiction question is concerned, is that there is nothing in the affidavits of specific character other than generalities which would give the Court jurisdiction, hearsay generalities, and nothing specifically in the affidavits.

No. 3—and as to No. 3 I am speaking generally from just a general glance at the first page of an affidavit that was just handed to me by Miss Gallagher, which in itself, I take it, just from a casual glance, without reading it, shows on its face that they have had full and free opportunity to examine the records of affiant and that it would be an abuse—well, this goes principally to the second proposition, that it would be an abuse of discretion.

I might tell your Honor that, on that particular point, Mr. Abendroth is in the courtroom here and if the Court should like to hear from him under oath I will be glad to submit him for such enlightenment as the Court might be willing to listen to.

The points on that particular score are that our affidavit shows, our counter-affidavit filed yesterday shows [10] that prior to the time that the two investigators went to investigate the defendant in this case he had discussions with persons, with the OPA including Miss Gallagher, regarding candy sales as well as other items that he sold in his store, and Mr. Abendroth is here to substantiate that under oath.

No. 2: When they came to investigate him he

permitted them to take, and the affidavit just handed to me indicates numerous records, voluminous records, and he is prepared to testify that they took books, files and invoices—that there wasn't any segregation of the particular invoices—took books, files and invoices to their offices, which he voluntarily permitted them to have, and over a period of two months they examined those records, and also examined records in his place of business; gave him no restrictions of any kind whatsoever; and candy sales as to these records, at least some of the records included records of candy sales and the candy sales were discussed.

Now he has a comparatively small business for his type of business. He has only two employees in his office besides himself, and help is difficult to obtain, as I believe the OPA believes. This is the case they have difficulty in getting help, and every investigation, every matter of this kind, does involve a sacrifice on the part of office help and on the part of himself. In trying to make a go of that business he needs every minute that he can get of the help of [11] his employees in proceeding with the business, and it would be unnecessary and unjust, and an arbitrary matter to permit examination and re-examination and inspection of records, and going into a matter which they had free and full opportunity to do. A question had been raised concerning candy sales as well as sales of other types of merchandise handled by a small wholesale grocer.

These are the points, in brief, your Honor, and, as I say, Mr. Abendroth is here ready to testify as to what the actual facts are concerning it. Based on the testimony I would like to have him adduce, and upon the points involved, I don't believe the Court should allow an order of inspection at this time.

Miss Gallagher: Your Honor, I have handed to Mr. Lenske, and have ready to file with you, with the Court, an affidavit signed by myself. It has not yet been acknowledged. May I acknowledge it in open court, and do I do it before the Clerk?

The Court: The Clerk can administer an oath.

(The Clerk here administered the oath to Miss Gallagher.)

Miss Gallagher: The point raised by Mr. Lenske on the question of jurisdiction can be briefly disposed of. I should like to submit this affidavit now, if you please.

I quoted from the Emergency Price Control Act at a former time. I shall quote it again, so that it can go into [12] this record.

Section 202(b) of the Act says that the "Administrator is authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents. The Administrator

may administer oaths and affirmations and may, whenever necessary, by subpoena, require a person to appear and testify or to appear and produce documents, or both, at any designated place."

Section (e) provides that "In case of contumacy by, or refusal to obey a subpoena served upon any person referred to subsection (c)".

Subsection (c) says that "For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify, or to appear and produce documents, or both, at any designated place".

Continuing, "the District Court for any district in which such person is found resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and [13] any failure to obey such order of the Court may be punished by such Court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b)".

The important part of subsection (b) is, I think, that the Administrator "may require any such person to affirm the inspection and copying of records and other documents".

Jurisdiction is granted to the District Court to enforce such an inspection and copying of records, as well as to enforce the obedience to a subpoena. There the same question that has arisen under the

question of jurisdiction to a question of issuing an order to inspect and copy records, has been up before other District Courts over the United States and such orders have been granted, and the question that goes to the discretion of the Court in allowing such an order to be issued, or issuing such an order.

We have stated Mr. Abendroth's affidavits that have been filed in this case, and the one which I have filed this morning sets out in detail the examination that he alleges that he did make during the first two months' period the first of this year. Our affidavit will show that Mr. Singleton, an investigator in our office, made his first call on Mr. Abendroth's store on the 12th of January. At that time he discussed with him his prices under Maximum Price Regulation 421 and some rationing which had arisen. The ration- [14] ing questions are not involved in any of these cases. Mr. Singleton asked and received the permission of Mr. Abendroth to examine records. He asked for the records that would establish what his ceiling prices and what his maximum prices under Maximum Price Regulation 421 were.

Thereafter, Mr. Singleton and another investigator, Mr. Harris, both working under my direction, called at the Abendroth office and storeroom and from time to time took certain bundles of purchase invoices or sales invoices from the store, handing to Mr. Abendroth a receipt for them, and then after some examination of them and transcriptions of

them returned them to the store and took out another bundle. The important thing about this first investigation, and it is set out in the affidavit, is that there was an investigation to determine the compliance with or any violations of Regulation 421 which controls prices of certain food items, grocery items, sold at wholesale. It was part of a series of investigations that our office made in all of the wholesale houses in Portland, large and small, and with very few exceptions of all wholesale houses selling groceries in the whole State of Oregon. It was concerned solely with the Regulation 421. It is true that in the sales invoices that were examined there were a number of sales of candies that an examination of the——

The Court: Your client asks if he may come inside. Certainly [15] he may.

Miss Gallagher: Under 421, the grocery Regulation, maximum prices are established by the seller's purchases of a food covered by the regulation during the period immediately surrounding August 5, 1943, his net cost at that time, plus a certain markup as its maximum price from there on out for certain grocery items covered by 421. Candy prices are established by what is called the General Maximum Price Regulation and established by the seller's highest price for the sales of the same kind of candy or tobacco products, or a similar kind, during March of 1942. So that an examination of the records from August 5th, 1943, which are these that were taken from the records of the respondent, and examined and transcribed,

would, in no way, disclose the maximum prices for candy or the highest selling price of the respondent during March of 1942. It is alleged by the respondent that we could have and should have continued our investigation and done everything necessary to be done under all the regulations applying to the respondent at the time we made our examination. The investigators transcribed and studied some 6,000 transactions under 421 Regulation. Transcriptions were a long-drawn-out piece of work, of which we are not complaining. That is our job. However, if we had taken the time then to have gone back to March, 1942, records for maximum prices, and then at the same time had continued our examination under [16] General Maximum Price Regulation to determine the sales of candies, our investigation would have lasted a considerable length of time more. We would have been delayed in consummating the regulation examination we were then making, which would quite conceivably have thrown us out of a chance to have filed a case, if a case were necessary to be filed under our statute.

Immediately after we finished our investigation and on April 18th, I wrote a letter to Mr. Abendroth, in which is set out in detail the findings of our investigation. Immediately after that I drew a complaint ready to be filed. It was on April 27th that Mr. Reuben Lenske, who represented Mr. Abendroth, first called upon me, and thereafter from time to time the filing of the com-

plaint was delayed at the specific request of Mr. Lenske, on behalf of Mr. Abendroth.

I have filed another affidavit, which states that we have reason to believe that General Maximum Price Regulation has been violated by Mr. Abendroth in his sales of candy and tobacco products. Unless we have an opportunity to examine his purchase records of March of 1942, and sales records since that time, we shall be unable in any way to say whether there are the violations which we think do exist.

The Court: What is the nature of that?

Miss Gallagher: It is a treble damage injunction suit.

The Court: Is it ready for trial? [17]

Miss Gallagher: The answer is filed, isn't it?

The Court: It is ready for trial, isn't it?

Mr. Lenske: Yes.

The Court: Maybe I had better go in and try that. How much is involved in that case?

Miss Gallagher: How much did we ask for in that case?

The Court: Yes.

Mr. Lenske: \$15,000, about.

The Court: How soon could you try it, Mr. Lenske?

Mr. Lenske: Next month, about the 15th.

The Court: When could you try it, Miss Gallagher?

Miss Gallagher: I could try it any time, I think, your Honor, after the 10th of November.

The Court: Why, you have other cases.

Miss Gallagher: Oh, I have seven cases on trial, on your docket, for the 14th of November.

The Court: You mustn't get too much work to tire yourself out. We had better try one case before we get another one. I can try it at any time and you can try it at any time before then?

Miss Gallagher: Yes, your Honor. I could conceivably go to trial next week.

The Court: And you?

Mr. Lenske: Well, I can't, without substantial sacrifice, your Honor. [18]

The Court: What do you mean, sacrifice?

Mr. Lenske: Well, I have so much lined up, and this case will take me a week's work in order to prepare for trial.

The Court: What is next Tuesday, the 23rd?

The Clerk: The 24th, your Honor.

The Court: We can try it in a day, can't we?

Miss Gallagher: That I am sure we can, your Honor.

Mr. Lenske: Well, I doubt it, your Honor. There are numerous items claimed by the plaintiff, and just how it will shape up I can't say at the present time.

The Court: That is what I would like to see. I would like to get the slant on what the plaintiff is able to establish against your client before I put him under the gun of the second investigation. I am trying to do you a favor.

Mr. Lenske: Well, I appreciate that.

The Court: Well then, you had better cooperate

and get ready for trial next week. Can you do it some day next week?

Mr. Lenske: Well, I would be glad to, if I could, your Honor.

The Court: Well, I will have to do my own setting, then, if you are not able to be more definite than that. We will try it on Monday afternoon, the 30th, beginning Monday afternoon, the 30th, at two o'clock in the afternoon.

Miss Gallagher: Oh, your Honor, that is one day next week. I could not. I should be in San Francisco. [19]

The Court: That is not next week.

Miss Gallagher: The 29th, 30th and 31st of October I shall have to be in San Francisco.

The Court: Then I won't set it at all. I will take it under advisement. We will recess now for a few minutes.

(Thereupon, the foregoing hearing was concluded at 10:04 o'clock A. M.) [20]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, certify that the pre-trial proceedings in the case of Chester Bowles, Administrator, Office of Price Administration, Plaintiff, vs. A. G. E. Abendroth, doing business as Candy and Tobacco House, Defendant, Civil No. 2564, were held on Monday, October 2, 1944, and Wednes-

day, October 18, 1944, before the Honorable Claude McColloch, Judge; that I reported all of said proceedings, and the foregoing twenty pages, numbered 1 to 20, both inclusive, contain a full, true and impartial record of said proceedings.

Dated at Portland, Oregon, this 14th day of March, A. D. 1945.

/s/ ALVA W. PERSON

Court Reporter

[Endorsed]: Filed March 23, 1945. [21]

[Endorsed]: No. 11024. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, as Administrator of the Office of Price Administration, Appellant, vs. A. G. E. Abendroth, doing business as Candy & Tobacco House, Appellee.

Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon. Filed April 3, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11024

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

v.

A. G. E. ABENDROTH, Doing business as Candy
& Tobacco House,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action the appellant, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. The Court erred in failing and refusing to grant appellant's application for an order requiring defendant to permit appellant's representatives to inspect and copy the defendant's records as prayed in the complaint.

The Court erred in dismissing the action.

HERBERT H. BENT

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement Attor-
ney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the entire certified transcript, including all exhibits, to be contained in the printed record on appeal herein.

HERBERT H. BENT

Acting Regional Litigation
Attorney

F. E. WAGNER

District Enforcement
Attorney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P.
O'Brien, Clerk.

No. 11024

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, as Administrator of the
Office of Price Administration,
Appellant,

vs.

A. G. E. ABENDROTH, doing business as Candy
& Tobacco House,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUG 13 1945

No. 11024

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, as Administrator of the
Office of Price Administration,
Appellant,
vs.

A. G. E. ABENDROTH, doing business as Candy
& Tobacco House,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Affidavit of Charles Craig, dated Sept. 8, 1944	6
Amended Designation of Record on Appeal...	12
Application for an Order Requiring Respondent to Permit Inspection of Inventory and Records	1
Certificate of Clerk to Transcript of Record..	13
Inspection Requirement Directed to A. G. E. Abendroth	9

In the District Court of the United States
In the District of Oregon

CHESTER BOWLES, as Administrator of the
Office of Price Administration,
Applicant,

vs.

A. G. E. ABENDROTH, doing business as Candy
& Tobacco House,
Respondent.

APPLICATION FOR AN ORDER REQUIR-
ING RESPONDENT TO PERMIT IN-
SPECTION OF INVENTORY AND REC-
ORDS

Chester Bowles, Administrator of the Office of Price Administration, applicant herein, applies to this Honorable Court, pursuant to Section 202(b) of the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944 (Pub. L. No. 421, 77th Cong., 2nd Sess., 56th Stat. 23, as amended by Pub. L. No. 383, 78th Cong., 2nd Sess.) for an order requiring A. G. E. Abendroth doing business as Candy & Tobacco House, to permit inspection and copying by duly authorized employees of the Office of Price Administration of each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco during the month of March, 1942; also each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes

and tobacco to all customers of respondent between the dates of November 1, 1943 to and including August 22, 1944; also each and every original purchase invoice in possession of respondent showing purchases of candy and candy products, gum, cigars, cigarettes and tobacco from his various suppliers between the dates of November 1, 1943 to and including August 22, 1944 as described in the Inspection Requirement herein referred to. In support thereof, applicant respectfully represents as follows: [1*]

I.

Respondent is an individual doing business as a cash and carry wholesaler of candy, tobacco and other food products under the trade name of Candy & Tobacco House with his principal place of business at 725 Northeast Davis Street, Portland, Oregon, and within the jurisdiction of this Court.

II.

Jurisdiction of this proceeding is conferred upon this Court by Section 202(e) of the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944 (Pub. L. No. 421, 77th Cong., 2nd Sess., 56th Stat. 23, as amended by Pub. L. No. 383, 78th Cong., 2nd Sess.) hereinafter referred to as the Act.

III.

Under the provisions of Sections 202(a) and (b) of the Act of the Administrator is authorized to

*Page numbering appearing at foot of page of original certified Transcript of Record

obtain information by oath, affirmation, or otherwise, and to inspect and copy records and other documents, and inspect inventories, as he deems necessary or proper to assist him in the administration and enforcement of the Act and the regulations, orders or price schedules issued thereunder.

IV.

On or about the 16th day of August, 1944, the applicant, through his duly authorized attorney determined that in the enforcement and administration of the Act and of the General Maximum Price Regulation, as amended and supplemented (7 F. R. 3153) issued pursuant to the Act on April 28, 1942, by the Administrator of the Office of Price Administration, an investigation was necessary to discover whether or not respondent had complied and was complying with the provisions of the Act and of said orders.

Such an investigation was commenced on or about August 14, 1944, in the course of which duly authorized employees of the Office of Price Administration orally requested respondents to permit them to inspect and copy their duplicate original sales invoices showing sales of candy and candy products, gum, cigars, cigarettes and tobacco sold during the month of March, 1942; also each and every duplicate original sales invoice showing sales of candy and candy products, [2] gum, cigars, cigarettes and tobacco to all customers of respondent between the dates of November 1, 1943 to and including August 22, 1944; also each and every

original purchase invoice in possession of respondent showing purchases of candy and candy products, gum, cigars, cigarettes and tobacco from his various suppliers between the dates of November 1, 1943 to and including August 22, 1944, which records were in his control and possession and required by the regulation to be made and kept by the respondent. On that occasion, respondent refused to permit either the inspection or copying of said records or any part thereof.

V.

Thereafter on August 23, 1944, the applicant issued an Inspection Requirement, a copy of which is attached hereto, marked Exhibit A, directing the respondent to permit Charles Craig and Harold Bowen, as the duly authorized representatives of the Office of Price Administration, to inspect and to copy all or any part of the following documents: Each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco during the month of March, 1942; also each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco to all customers of respondent between the dates of November 1, 1943 to and including August 22, 1944; also each and every original purchase invoice in possession of respondent showing purchases of candy and candy products, gum, cigars, cigarettes and tobacco from his various suppliers between the dates of November 1, 1943 to and including August 22, 1944.

Said Inspection Requirement was personally served on A. G. E. Abendroth on the 29th day of August, 1944, at 725 North East Davis Street, Portland, Oregon, as shown by the affidavit of Charles Craig, attached hereto, marked Exhibit B, and by this reference made a part hereof. Respondent, as further shown by said affidavit, refused to permit the inspection and copying of records as required, stating to the said Charles Craig and Harold Bowen that they would have to get an order from the Court to check his records.

VI.

The applicant is informed and believes and therefore alleges that all of the records described in said Inspection Requirement constitute evidence [3] which is competent, relevant and necessary in the said investigation and that such investigation is essential to the enforcement and administration of the Act and of the General Maximum Price Regulation, as amended and supplemented (7 F. R. 3153) issued pursuant to the Act on April 28, 1942, by the Administrator of the Office of Price Administration. Applicant is informed and believes, and therefore alleges that said records described in said Inspection Requirement are now and at all times herein mentioned have been within the possession and control of the respondent.

Wherefore the applicant, Chester Bowles, as Administrator of the Office of Price Administration respectfully prays that

(a) An order to show cause be issued forthwith directing the respondent to appear before this Court on a day certain, to be fixed in said order, and show cause, if any there be, why an order should not issue requiring the respondent to permit the inspection and copying by authorized employees of the Office of Price Administration of the records described in said Inspection Requirement at such time as this Court may order; and

(b) The application of such other and different relief as may be necessary or appropriate in the premises.

By /S/ CECELLA P. GALLAGHER

Enforcement Attorney

/S/ F. E. WAGNER

District Enforcement At-
torney [4]

[Title of District Court and Cause.]

AFFIDAVIT

I, Charles Craig, being duly sworn, depose and say:

1. I am, and at all times herein mentioned have been, a duly authorized investigator of the Office of Price Administration. I make this affidavit in support of the applicant's petition herein for an Order Requiring Respondent to Permit Inspection of Inventory and Records.

2. On August 16, 1944, I went to the place of business of A. G. E. Abendroth doing business as

Candy & Tobacco House at 725 North East Davis Street, Portland, Oregon, and talked with a person who said she was the office girl. I presented my investigator's identification and explained to her that I wanted to see Mr. Abendroth's records for March, 1942, and she brought the records and laid them on a desk for me and said I could use that desk. I was checking these records when a gentleman who said he was Mr. Abendroth, came into the room and asked the girl what I was doing. I explained to Mr. Abendroth that I wanted to check their candy sales for March, 1942, and that the girl had given me the box containing these records, which I was checking. He said, "You can't check these records". I explained that the Emergency Price Control Act and the General Maximum Price Regulation state that the records shall be available to the Office of Price Administration. Mr. Abendroth said, "You can't check those records as we have litigation pending now and there is no reason for snooping over any more records." Mr. Abendroth then called and talked with someone over the telephone. [5] When he finished his conversation, he turned to me and said, "That's the story". I said, "What's that?" and he said, "You can't check no records here," and to go back and tell the party who sent me there the same thing. I then asked Mr. Abendroth if he had been talking with his attorney and he said, "Yes, that was my attorney." Mr. Abendroth left me and went out into the warehouse and I waited for him to question him further but as he did not return I went back to my office for further instructions.

3. On August 31, 1944, Harold Bowen, a duly authorized investigator for the Office of Price Administration and I called on A. G. E. Abendroth at 725 North East Davis Street, Portland, Oregon, to serve upon him an Inspection Requirement of the Office of Price Administration, requiring A. G. E. Abendroth, doing business as Candy & Tobacco House, to permit Charles Craig and Harold Bowen, representatives of the Office of Price Administration to inspect, at Mr. Abendroth's place of business, the following documents:

Each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco during the month of March, 1942;

Also each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco to all his customers between the dates of November 1, 1943 to and including August 22, 1944;

Also each and every original purchase invoice in his possession showing purchases of candy and candy products, gum, cigars, cigarettes and tobacco from his various suppliers between the dates of November 1, 1943 to and including August 22, 1944. and to permit the aforesaid representatives of the Office of Price Administration to copy all or any part of the said documents. Such Inspection Requirement was signed by James F. Brownell, Acting Price Administrator, and was issued the 23rd day of August, 1944, at Washington, D. C.

When Mr. Bowen and I entered Mr. Abendroth's office on the above date, August 31, 1944, he was counting money at his desk. He looked up and said "Well, what do you want?" I told him I had an Inspection Requirement to check his records on candy sales. Mr. Abendroth said that I couldn't check any more records, as they were in litigation now, and that we would have to get an order from the Court to check any more records. I left a copy of the Inspection Requirement with [6] Mr. Abendroth and returned to my office.

4. A. G. E. Abendroth did, at the time of the two visits above described, and has since consistently refused to permit the inspection and copying of any of the above described documents and records.

/s/ CHARLES CRAIG

Subscribed and sworn to before me this 8th day of September, 1944.

[Seal] /s/ W. A. STOCKMAN

Notary Public in and for the State of Oregon.

My Commission expires January 20, 1947. [7]

United States of America
Office of Price Administration

INSPECTION REQUIREMENT

To: A. G. E. Abendroth d/b/a Candy and Tobacco
House

In connection with an investigation to assist the
Price Administrator, Office of Price Administra-

tion, in the administration and enforcement of the Emergency Price Control Act of 1942, as amended, and especially of the following:

The General Maximum Price Regulation, as amended

You Are Hereby Forthwith Required to Permit Charles Craig and Harold Bowen representatives of the Office of Price Administration to inspect at your place of business the following documents:

Each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco during the month of March, 1942;

Also each and every duplicate original sales invoice showing sales of candy and candy products, gum, cigars, cigarettes and tobacco to all your customers between the dates of November 1, 1943 to and including August 22, 1944;

Also each and every original purchase invoice in your possession showing purchases of candy and candy products, gum, cigars, cigarettes and tobacco from your various suppliers between the dates of November 1, 1943 to and including August 22, 1944, and to permit the aforesaid representatives of the Office of Price Administration to copy all or any part of the said documents, and

You Are Further Required to Permit the aforesaid representatives to inspect the following:

now in your possession or under your control.

Issued this 23rd day of August, 1944, at Washington, D. C.

/S/ JAMES F. BROWNLEE

Acting Price Administrator, Office of Price Administration

Sections 202(a) and 202(b) of the Emergency Price Control Act of 1942 (Public Law 421—77th Cong, chapter 26—2nd Sess.), as amended, authorize the Price Administrator to make such studies and investigations of price and rent matters as he deems necessary or proper to assist him in prescribing any regulation or order under the Act, or in its administration or enforcement, and to require any person who is engaged in the business of dealing with any commodity, or who rents or offers to rent or acts as broker or agent for the rental of any defense housing accommodations, to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of such housing accommodations. Under Section 4(a) of the Act, wilful refusal to obey this inspection requirement is a violation of the law, and under Section 205(b) any person guilty of such violation will be liable to a fine of not more than \$5,000 or to imprisonment for not more than one year, or both. Under Section 205(a) such violation may also cause the issuance of a court order, the disobedience of which will render a violator subject to punishment for contempt of court. [8]

RETURN OF SERVICE

I certify that a duplicate original of the within Inspection Requirement was duly served*

X on the person named therein.

by leaving the said original at the principal office or place of business of the person named therein, to wit, at 29th.....
on the 29th day of August, 1944 at 2:33 P. M.

/S/ CHARLES P. CRAIG

Person Making Service

Commodity Investigator

Title

*Check method used.

[Endorsed]: Filed Sept. 9, 1944. [9]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for order requiring respondent to permit inspection of records.
2. Plaintiff's Affidavits filed October 16 and October 18, 1944.
3. Defendant's Affidavits filed September 30 and October 18, 1944.
4. Order to Show Cause.

5. Order of Dismissal.
6. Transcript of Hearing on Motion for Order to Show Cause, October 2, 1944.
7. Transcript of Hearing on Motion to Dismiss, October 18, 1944.
8. Notice of Appeal.
9. Designation of Record.
10. This Amended Designation of Record.

Dated at Portland, Oregon, this day of June, 1945.

/s/ F. E. WAGNER

Of Attorneys for Appellant

[Endorsed]: Filed June 30, 1945. [10]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 11 inclusive, constitute the transcript of application for an order requiring respondent to permit inspection of inventory and records, amended designation of record, and certificate in cause No. Civil 2564, in which Chester Bowles, Administrator, Office of Price Administration is plaintiff and appellant, and A. G. E. Abendroth, doing business as Candy & Tobacco House, is defendant and appellee; that said transcript has been pre-

pared by me in accordance with paragraphs 1 and 10 of the amended designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of that portion of the record and proceedings had in said court in said cause, in accordance with the said amended designation, as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 5th day of July, 1945.

[Seal]

LOWELL MUNDORFF,

Clerk

By F. L. BUCK

Chief Deputy [11]

[Endorsed]: No. 11024. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, as Administrator of the Office of Price Administration, Appellant, vs. A. G. E. Abendroth, doing business as Candy & Tobacco House, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed July 9, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, AS ADMINISTRATOR OF THE OFFICE
OF PRICE ADMINISTRATION, APPELLANT

v.

A. G. E. ABENDROTH, DOING BUSINESS AS CANDY &
TOBACCO HOUSE, APPELLEE

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

FILED

SEP 13 1945

REUBEN G. LENSKE,
Yeon Bldg.,
Portland, Ore.,
Attorney for Appellee.

PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Statement	1
Specification No. 1.....	2
Argument	2
Specification No. 2.....	4
Argument	4
Specification No. 3	5
Argument	5

CASES

Brown v. Glick Bros. Lumber Co., 52 F. Supp. 913, D.C. Cal. 1943.....	5
--	---

STATUTES

50 U.S.C.A., Sec. 925 (e), p. 405.....	3
50 U.S.C.A., Sec. 925 (e), p. 406.....	3

In the United States
Circuit Court of Appeals
For the Ninth Circuit

**CHESTER BOWLES, AS ADMINISTRATOR OF THE OFFICE
OF PRICE ADMINISTRATION, APPELLANT**

v.

**A. G. E. ABENDROTH, DOING BUSINESS AS CANDY &
TOBACCO HOUSE, APPELLEE**

APPELLEE'S BRIEF

**Upon Appeal from the District Court of the United
States for the District of Oregon.**

STATEMENT

Appellee, A. G. E. Abendroth, doing business under the assumed name of Candy & Tobacco House, operates a small wholesale grocery business in Portland, Oregon. Amongst the items he sells are candy and tobacco. On August 4, 1944, an action was brought against him by the Price Administrator for

the sum of \$14,919.87 as treble damages for sales of groceries at allegedly above ceiling prices (Case No. 2532, U. S. District Court for the District of Oregon). On the 9th day of September, 1944, the Administrator brought the within suit for inspection of the same records that the Administrator examined and/or had in his possession prior to the filing of the treble damage action. Trial was had of Case No. 2532 in November, 1944, resulting in a final judgment for the defendant insofar as any damages for the alleged above ceiling sales were concerned. On December 5, 1944, an order was entered dismissing the suit seeking inspection of the above mentioned appellee's records.

SPECIFICATION NO. 1

This appeal should be dismissed because it is based upon a moot question.

ARGUMENT

The purpose of inspecting the records was to obtain the basis for the bringing of a damage action by the Administrator for alleged sale of candy and tobacco at above ceiling prices. Counsel for appellant so informed the court (Tr. 25-26) :

“Miss Gallagher: It is perfectly clear these are two separate and distinct cases, your Honor?”

The Court: One of them is a proceeding for discovery and the other is a trial of a damage issue.

Miss Gallagher: Yes, but the discovery is aimed toward a different particular and a different set of circumstances than the case which is already filed.

The Court: Oh, it is?

Miss Gallagher: Yes, your Honor.

The Court: Oh, I see. *So if you get the information you want you will bring another case against him?*

Miss Gallagher: That is right."

For that purpose appellant seeks an examination of the purchase and sales records from November 1, 1943 to and including August 22, 1944. (See complaint Tr. 2).

The Emergency Price Control Act itself limits the right of the administrator to bring an action for violation of the Act to one year from the date of the alleged violation. 50 U.S.C.A. Sec. 925(e), p. 405:

"If any person selling a commodity violates a regulation, order or price schedule . . . the person who buys such commodity . . . may, *within one year* from the date of the occurrence of the violation . . . bring an action against the seller on account of the overcharge."

Quoting from the same section on p. 406:

"If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for

any reason to bring the action, *the Administrator may institute such action on behalf of the United States within such one year period.*" (Italics ours.)

Since the last record sought in the suit would be August 22, 1944, no action could be properly brought by the Administrator even if he found violations from those records. The appeal should, therefore, be dismissed.

SPECIFICATION NO. 2

The Act does not provide for it and appellant has failed to lay the proper foundation for the relief prayed for.

ARGUMENT

He bases his complaint upon Sec. 922 of the Emergency Price Control Act appearing in Title 50 U.S.C.A. p. 360. Subsection (e) does grant the District Court jurisdiction to require a person who fails to obey a subpoena to appear and produce documents. There is nothing said about further jurisdiction of the court excepting that that subsection "shall also apply to any person referred to in subsection (b)." That refers to the last sentence in subsection (b) which provides that the Administrator may administer oaths and subpoena persons to testify and produce documents.

Appellant's complaint and affidavits show on their face that no subpoena was ever issued by the Administrator. It is true that the Administrator is given the right to inspect records, but neither he nor the Court are given the right to force inspection of records excepting through the procedure of subpoena. This would appear from a close examination of the Act itself and also from the general principles of law, and some support is given to that interpretation in the case of *Brown v. Glick Bros. Lumber Co.*, 52 F. Supp. 913, D.C. Cal. 1943.

SPECIFICATION NO. 3

The Trial Court properly exercised its discretion and no abuse of that discretion is proved in appellant's brief.

ARGUMENT

While the Court is given jurisdiction to require the appearance of a person and the production of his documents, the Act does not make it mandatory upon the Court to do so. The matter is therefore within the discretion of the Court. In this case the Court tried the treble damage action brought by the Administrator for \$14,919.87. In that trial the Court had opportunity to ascertain to what extent the records of appellee were examined by appellant. Moreover, the

affidavits submitted on behalf of appellant themselves disclose that appellant's representatives not only inspected practically all of the records in issue at appellee's place of business, but took them to the office of the Administrator and kept them for a considerable length of time (Tr. 5). Numerous sales records and purchase invoices totaling "approximately 6,000 transactions" (Tr. 7) were examined by the Administrator. Examination was commenced on January 20, 1944 and the last records were not returned until March 29, 1944. (Tr. 5 and 6)

In the trial proceedings of case No. 2532 on page 41, Mr. Singleton, a representative of appellant, testified as follows:

"Q. Now, Mr. Singleton, you had some of Mr. Abendroth's records in your office with you, did you?

A. Yes, I did.

Q. How long a period of time did you work on his records?

A. Oh, I would say about two months. It was quite a job.

Q. And what proportion of that time did you put on that?

A. Full time.

Q. You worked on his records full time for two months?

A. That is right.

Q. And did you have any assistance?

A. I did.

Q. How much assistance did you have?

A. One other man besides myself.

Q. And he worked on it full time also?

A. That is right."

The transcript of those trial proceedings is on file with the clerk. Mr. Singleton also testified as follows on page 43 of those trial proceedings:

“Q. Now during that period you also asked him to permit you to take the records from his own place of business to your office?

A. That is right.

Q. And he permitted you to do so?

A. That is correct.

Q. And you took whole cartons full of records?

A. I took cartons which I enumerated to you a while ago are the bound sales, invoices of his sales in bound book form, which are numbered and were placed in cartons approximately a yard long when we sat in there for a full month. We took a month at a time. . . .”

And on p. 45:

“Q. I see. Well then each one of these cartons that we estimate might have had from two thousand to four thousand invoices?

A. I would say around that figure probably.”

Mr. Abendroth's affidavits (Tr. 9, 10, 11, 12 and 13) showed among other things (Tr. 10):

“That said investigation caused an interruption of business at considerable expense to respondent and any further investigation would do likewise.”

(Tr. 12)

“That said investigators examined invoices covering current purchases and sales as well as numerous other items purchased and sold by affiant in his business. That I discussed the matter of specific candy sales with Cecilia P. Gallagher

prior to the time that the investigators examined records of affiant.”

(Also on Tr. 12)

“that said investigators examined invoices covering candy purchases and sales as well as numerous other items purchased and sold by affiant in his business; . . .”

The Court, therefore, had before it testimony by way of affidavits to the effect that candy sales were both discussed and examined by appellant’s representatives. The mere fact that a different method of computation of the ceiling price was used by appellant on different articles sold by appellee would not justify unreasonable and duplicating examinations or inspections by appellant. The affidavits of appellee show that his business is a small one and that the inspection by appellant caused substantial loss to him. It would be unreasonable to duplicate that loss unnecessarily.

It is true that the Court was satisfied as a result of the trial in Case No. 2532 that the Administrator would have no further cause against appellee, but that is not the only ground that is apparent for the dismissal of the suit. A reasonable opportunity for the inspection of the records is all that appellant should expect, and the Court found that that reasonable opportunity had already been afforded appellant. The Court exercised its discretion properly. In fact, it would have been an abuse of its discretion to subject

appellee to the unreasonable duplicating search that appellant sought.

For each of the three specifications mentioned, the lower court's order should be affirmed.

Respectfully submitted,

REUBEN G. LENSKE,

Attorney for Appellee.

